

ARKANSAS CODE OF 1987 ANNOTATED

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VOLUME 3A • TITLE 5, CH. 1-49



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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 3A

2006 Replacement

TITLE 5: CRIMINAL OFFENSES (CHAPTERS 1-49)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2005 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2005 Ark. LEXIS 724 (November 17, 2005) and 2005 Ark. App. LEXIS 836 (November 17, 2005).

Federal Supplement through November 17, 2005.

Federal Reporter 3d Series through November 17, 2005.

United States Supreme Court Reports, through November 17, 2005.

Bankruptcy Reporter through November 17, 2005.

Arkansas Law Notes through the 2001 Edition.

Arkansas Law Review through Volume 57, p. 1015.

University of Arkansas at Little Rock Law Journal through Volume 26, p. 985.

ALR 6th through Volume 4, p. 599.

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User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 5
CRIMINAL OFFENSES
(CHAPTERS 50-79 IN VOLUME 3B)

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Publisher's Notes. Acts 1975, No. 928, which became effective simultaneously with the Arkansas Criminal Code on January 1, 1976, repealed former criminal provisions. Section 2 of that act provided that, although all or part of a statute defining a criminal offense was amended or repealed by the act, the statute or part thereof so amended or repealed would remain in force for the purpose of authorizing the prosecution, conviction and

punishment of a person committing an offense under the statute or part thereof prior to the effective date of the act.

For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1975, No. 280, § 101: effective Jan. 1, 1976.

Acts 1975, No. 928, § 1: effective simultaneously with the Arkansas Criminal Code on Jan. 1, 1976.

CASE NOTES**Purpose.**

Purpose of the 1976 Criminal Code was to eliminate archaic statutes, replace the profusion of overlapping statutes, and de-

velop an evenhanded method of grading offenses. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

SUBTITLE 1. GENERAL PROVISIONS**CHAPTER 1****GENERAL PROVISIONS**

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- 5-1-101. Title.
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- 5-1-114. Affirmative defense — Former prosecution in another jurisdiction.
- 5-1-115. Former prosecutions which are not affirmative defenses.
- 5-1-116. [Repealed.]
- 5-1-117 — 5-1-124. [Reserved.]
- 5-1-125. [Repealed.]

Preambles. Acts 1987, Nos. 484 and 586, contained a preamble which read:

“Whereas, in many instances, child victims are threatened or intimidated to prevent the prompt reporting of abuse or sexual offenses; and

“Whereas, it is in the best interest of the State to extend the statute of limitations for certain offenses involving child victims;

“Now therefore ...”

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1994 (2nd Ex. Sess.), No. 45, § 6: Aug. 25, 1994. Emergency clause provided: “It is hereby found and determined by the Seventy-Ninth

General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that minors commit many serious criminal offenses by the use of deadly weapons or by the use of prohibited weapons. The criminal penalties for furnishing deadly weapons to minors and for furnishing prohibited weapons, must be increased in order to decrease the availability of such weapons. Therefore, in order to immediately enhance the penalties for furnishing a deadly weapon to a minor and for furnishing a prohibited weapon, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

ALR. Automatism or unconsciousness as defense to criminal charge. 27 ALR 4th 1067.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 1 et seq.

Ark. L. Rev. 1976 Criminal Code-General Principles, 30 Ark. L. Rev. 111.

C.J.S. 22 C.J.S., Crim. L., § 1 et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-1-101. Title.

This act shall be known as the “Arkansas Criminal Code”.

History. Acts 1975, No. 280, § 101; A.S.A. 1947, § 41-101.

A.C.R.C. Notes. For application of the Arkansas Criminal Code to a prosecution for an offense defined by a statute not a part of the Arkansas Criminal Code, see § 5-1-103(b).

Meaning of “Arkansas Criminal Code”. Acts 1975, No. 280, as amended by Acts 1977, No. 360, codified as §§ 5-1-101 — 5-1-115, 5-1-116 [repealed], 5-2-201 — 5-2-209, 5-2-301 — 5-2-313, former 5-2-314, former 5-2-315, 5-2-316, 5-2-401 — 5-2-406, 5-2-501 — 5-2-503, 5-2-601 — 5-2-614, 5-3-101 — 5-3-103, 5-3-201 — 5-3-204, 5-3-301, 5-3-302, 5-3-401 — 5-3-407, 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-311, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-505

[repealed], 5-4-601 — 5-4-608, 5-5-101, 5-5-102, 5-10-101 — 5-10-105, 5-11-101 — 5-11-106, 5-12-101 — 5-12-103, 5-13-201 — 5-13-208, 5-13-301, 5-14-101 — 5-14-103, 5-14-104 — 5-14-109 [repealed], 5-14-110 — 5-14-112, 5-25-101, 5-26-201 — 5-26-203, 5-26-401, 5-27-201, 5-27-202, 5-27-205, 5-27-206, 5-27-209, 5-36-101 — 5-36-108, 5-37-101, 5-37-201 — 5-37-214, 5-38-101, 5-38-202 — 5-38-205, 5-38-301 — 5-38-303, 5-39-101, 5-39-201 — 5-39-203, 5-52-101, 5-52-102 [repealed], 5-52-103 [repealed], 5-52-104 — 5-52-107, 5-53-101 — 5-53-116, 5-54-101 — 5-54-113, 5-54-114 [repealed], 5-54-115 — 5-54-121, 5-60-101, 5-62-101, 5-62-122, 5-70-101 — 5-70-106, 5-71-101, 5-71-201 — 5-71-216, 5-73-101 — 5-73-110, 12-29-109.

CASE NOTES

Cited: Johnson v. State, 261 Ark. 714, 551 S.W.2d 203 (1977); Campbell v. State, 265 Ark. 77, 576 S.W.2d 938 (1979); Patrick v. State, 265 Ark. 334, 576 S.W.2d 191 (1979); Woodard v. Sargent, 806 F.2d 153

(8th Cir. 1986); Cummings v. State, 353 Ark. 618, 110 S.W.3d 272 (2003); Stivers v. State, 354 Ark. 140, 118 S.W.3d 558 (2003).

5-1-102. Definitions.

As used in the Arkansas Criminal Code:

- (1) “Act” or “action” means the same as defined in § 5-2-201;
- (2) “Actor” includes, when appropriate, a person who possesses something or who omits to act;
- (3) “Conduct” means the same as defined in § 5-2-201;
- (4) “Deadly weapon” means:
 - (A) A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury; or
 - (B) Anything that in the manner of its use or intended use is capable of causing death or serious physical injury;
- (5) “Element of the offense” means the conduct, the attendant circumstances, or the result of conduct that:
 - (A) Is specified in the definition of the offense;
 - (B) Establishes the kind of culpable mental state required for commission of the offense; or
 - (C) Negates an excuse or justification for the conduct;
- (6)(A) “Firearm” means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.
 - (B) “Firearm” includes:

(i) A device described in subdivision (6)(A) of this section that is not loaded or lacks a clip or another component to render it immediately operable; and

(ii) Components that can readily be assembled into a device described in subdivision (6)(A) of this section;

(7) “Included offense” means the same as defined in § 5-1-110(b);

(8)(A) “Knowingly” or an equivalent term such as “knowing”, “with knowledge”, “willful”, or “willfully” means the same as “knowingly” defined in § 5-2-202.

(B) However, if the statute clearly indicates a legislative intent to require a culpable mental state of “purposely”, “willful” or “willfully” means the same as “purposely” defined in § 5-2-202;

(9) “Law” includes a statute or court decision;

(10) “Law enforcement officer” means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense;

(11) “Negligently” or an equivalent term such as “negligence” or “with negligence” means the same as defined in § 5-2-202;

(12) “Omission” or “omit to act” means the same as defined in § 5-2-201;

(13)(A) “Person”, “actor”, “defendant”, “he”, “she”, “her”, or “him” includes:

(i) Any natural person; and

(ii) When appropriate, an “organization” as defined in § 5-2-501.

(B)(i)(a) As used in §§ 5-10-101 — 5-10-105, “person” also includes an unborn child in utero at any stage of development.

(b) “Unborn child” means a living fetus of twelve (12) weeks or greater gestation.

(ii) This subdivision (13)(B) does not apply to:

(a) An act that causes the death of an unborn child in utero if the act was committed during a legal abortion to which the woman consented;

(b) An act that is committed pursuant to a usual and customary standard of medical practice during diagnostic testing or therapeutic treatment; or

(c) An act that is committed in the course of medical research, experimental medicine, or acts deemed necessary to save the life or preserve the health of the mother.

(iii) Nothing in this subdivision (13)(B) shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero;

(14) “Physical injury” means the:

(A) Impairment of physical condition;

(B) Infliction of substantial pain; or

(C) Infliction of bruising, swelling, or a visible mark associated with physical trauma;

(15) “Possess” means to exercise actual dominion, control, or management over a tangible object;

(16) "Public servant" means any:

(A) Officer or employee of this state or of any political subdivision of this state;

(B) Person exercising a function of any officer or employee of this state or any political subdivision of this state;

(C)(i) Person acting as an adviser, consultant, or otherwise in performing any governmental function.

(ii) However, this subdivision (16)(C) does not include a witness; or

(D) Person elected, appointed, or otherwise designated to become a public servant although not yet occupying that position;

(17) "Purposely" or an equivalent term such as "purpose", "with purpose", "intentional", "intentionally", "intended", or "with intent to" means the same as "purposely" as defined in § 5-2-202;

(18) "Reasonably believes" or "reasonable belief" means a belief:

(A) That an ordinary and prudent person would form under the circumstances in question; and

(B) Not recklessly or negligently formed;

(19) "Sawed-off or short-barreled rifle" means:

(A) A rifle having one (1) or more barrels less than sixteen inches (16") in length; or

(B) Any weapon made from a rifle, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(20) "Sawed-off or short-barreled shotgun" means:

(A) A shotgun having one (1) or more barrels less than eighteen inches (18") in length; or

(B) Any weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon, as modified, has an overall length of less than twenty-six inches (26");

(21) "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ; and

(22) "Statute" includes the Arkansas Constitution and any statute of this state, any ordinance of a political subdivision of this state, and any rule or regulation lawfully adopted by an agency of this state.

History. Acts 1975, No. 280, § 115; A.S.A. 1947, § 41-115; Acts 1994 (2nd Ex. Sess.), No. 45, § 2; 1999, No. 1273, §§ 1-3; 1999, No. 1476, § 1; 2005, No. 1994, § 442.

Amendments. The 2005 amendment, in (8), substituted "knowing," "with knowledge," "willful," or "willfully" for "knowing

or 'with knowledge'" and added "unless ... specified in § 5-2-202(1)"; and substituted "'purpose,' 'with purpose,' 'intentional,' 'intentionally,' 'intended,' or 'with intent to'" for "'purpose' or 'with purpose'" in (17).

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

RESEARCH REFERENCES

ALR. Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 ALR 5th 657.

Ark. L. Rev. The Fetal Protection Act: Redefining "Person" for the Purposes of

Arkansas' Criminal Homicide Statutes, 54 Ark. L. Rev. 75 (2001).

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

Annual Survey of Caselaw, Tort Law, 24 UALR L.J. 1085.

CASE NOTES

ANALYSIS

Constitutionality.

Deadly weapon.

Firearm.

Jury instructions.

Physical injury.

Possess.

Serious physical injury.

Constitutionality.

Defendant's argument that this section was unconstitutional was not considered by the appellate court where defendant failed to present a record or abstract on appeal that informed the appellate court of the arguments made below; failure to produce a critical document on appeal precluded the appellate court's consideration of any constitutional issues. *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003).

Deadly Weapon.

Jury's finding that an automobile driven by defendant was a deadly weapon was supported by evidence. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

A gun is a deadly weapon, even if it has faulty ammunition that could not inflict serious injury. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Five foot length of iron pipe was capable of causing death or serious injury. *Jones v. State*, 292 Ark. 183, 729 S.W.2d 10 (1987).

Scissors clearly fall within the definition of a deadly weapon. *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996).

Firearm.

An M-1 rifle used by the Veterans of Foreign Wars for ceremonial purposes was a "firearm" within the meaning of this section, notwithstanding that it had been modified to shoot only blanks, because it could be easily converted to fire live ammunition with no special tools. *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998).

Court did not err in declining to direct a verdict on the charges of felon in possession of a firearm and simultaneous possession of drugs and a firearm because the firearm in question met the statutory definition of firearm under this section; hence, defendant's convictions were upheld. *Hunt v. State*, 354 Ark. 682, 128 S.W.3d 820 (2003).

Jury Instructions.

The trial court did not err in refusing to instruct the jury on the statutory definition of "sawed-off shotgun" where such definition was not enacted at the time of the offense. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

Prosecutor did not clearly and unequivocally misstate the state's burden of disproving self-defense beyond a reasonable doubt during voir dire and, therefore, the trial court did not manifestly abuse its discretion by failing to instruct the jury not to consider same; the prosecutor relied on the Arkansas Model Jury Instructions — Criminal as the basis for the definition and explanation of proof beyond a reasonable doubt and his statements to the jury about conflicting testimony were not technically incorrect, however, his statements represented a subtle attempt to shift the burden of proof by equating defendant's burden of proof with the state's burden. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), cert. denied, 540 U.S. 1050, 124 S. Ct. 832, 157 L. Ed. 2d 699 (2003).

Physical Injury.

Evidence was insufficient to establish that victim's physical condition was impaired or that victim was inflicted with substantial pain. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638, review denied, *Kelley v. State*, 7 Ark. App. 230, 646 S.W.2d 703 (1983); *Hundley v. State*, 22 Ark. App. 239, 738 S.W.2d 107 (1987);

Johnson v. State, 28 Ark. App. 256, 773 S.W.2d 450 (1989).

Injuries were sufficient to demonstrate that there was "substantial pain" within the meaning of subdivision (14). Middleton v. State, 14 Ark. App. 92, 685 S.W.2d 182 (1985); Armstrong v. State, 35 Ark. App. 188, 816 S.W.2d 620 (1991).

In determining whether an injury inflicts substantial pain for purposes of subdivision (14), the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted; the finder of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life. Holmes v. State, 15 Ark. App. 163, 690 S.W.2d 738 (1985); Cole v. State, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

Where the two-year old victim had bite marks on her buttocks and pinch marks and apparent fingerprints on her face, and there was testimony by the babysitter that the child appeared to be terrified of the defendant, the jury could reasonably find that the infliction of the bruises was accompanied by the infliction of substantial pain and the victim suffered "physical injury." Spencer v. State, 17 Ark. App. 149, 705 S.W.2d 454 (1986).

Fact that victim does not verbalize his pain is not conclusive as to whether substantial pain has been inflicted. Cole v. State, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

Evidence was sufficient to show that the victim sustained a physical injury, even though she was not hospitalized, where she testified that she was stabbed in the shoulder, back, and arm and that the knife penetrated the muscle in her shoulder area, that she felt faint and "felt this warmth run down my body," that she was scarred as a result of the attack, and that she continued to receive treatment for those scars. Farrelly v. State, 70 Ark. App. 158, 15 S.W.3d 699 (2000).

In determining whether a "physical injury" occurred, the trier of fact may consider the sensitivity of the area of the body to which the injury is inflicted and the severity of the attack; thus, where victim testified that defendant beat him repeatedly with a steel pipe, resulting in his face and nose being "busted up" as well as

considerable facial bleeding, the trial court did not err in finding that defendant's purpose was to inflict substantial pain with the pipe. Stultz v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 560 (Sept. 7, 2005).

Possess.

Possession (possess) as defined in this section concerns the actual dominion, control or management and includes constructive possession with knowledge of presence and control of the substance, rather than literal or physical possession. Glover v. State, 273 Ark. 376, 619 S.W.2d 629 (1981).

Possession excludes a passing control, fleeting and shadowy in nature; however, this exclusion does not insulate from prosecution those who seek to dispose of contraband upon discovering that the police are approaching. Turner v. State, 24 Ark. App. 102, 749 S.W.2d 339 (1988).

Serious Physical Injury.

Issue as to whether the victim's injuries constituted a temporary or protracted impairment of a function of a bodily member or organ was for resolution by the jury. Harmon v. State, 260 Ark. 665, 543 S.W.2d 43 (1976).

Serious physical injury, as defined in this section, meets the constitutional standards for definiteness and is not vague or overbroad since it states the extent of harm that the victim must endure in order for the injury to constitute a "serious physical injury." Lum v. State, 281 Ark. 495, 665 S.W.2d 265 (1984).

Evidence was sufficient to support a finding of serious physical injury. Lum v. State, 281 Ark. 495, 665 S.W.2d 265 (1984); Tarentino v. State, 302 Ark. 55, 786 S.W.2d 584 (1990); Purifoy v. State, 307 Ark. 482, 822 S.W.2d 374 (1991); Weaver v. State, 324 Ark. 290, 920 S.W.2d 491 (1996).

Where defendant held child-victim's hands under hot water long enough to cause second- and third-degree burns, victim suffered a "serious physical injury" as defined in subdivision (19) of this section, but where defendant lacked the mental state required for first-degree battery, defendant was guilty of second-degree battery. Tigue v. State, 319 Ark. 147, 889 S.W.2d 760 (1994).

Where victim was hit repeatedly in the

head and face with defendant's fist, was kicked repeatedly, has a permanent scar on her forehead, remained in the emergency room for three and one half hours, and subsequently remained in the hospital for thirty-six to forty-eight hours, there was substantial evidence to support defendant's conviction for second degree battery. *Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995).

There was substantial evidence that defendant acted with the purpose to cause serious physical injury to the victim under circumstances manifesting extreme indifference to the value of human life where he kicked the victim in the head repeatedly after the victim was down. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

Defendant caused "serious physical injury" to his wife, as defined in subdivision (19), where he shot her in the buttocks and the bullets pierced her small intestine, causing her to spend nine days in the hospital. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001).

No serious injury under § 5-13-102(19) or 5-13-201(a)(1), or injury by means of a firearm under § 5-13-201(a)(7), was shown where defendant hit the victim with the butt of a pistol because the injury did not require stitches and because striking a person in such a manner did not constitute injury to another person by means of a firearm under § 5-13-201(a)(7); rather, the injury was covered by § 5-13-202(a)(1). *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

Officer's testimony that when he opened the side door and looked in the driver's seat he observed a .22 Derringer pistol in plain view, which was loaded with two rounds, constituted substantial evidence that the .22 pistol was a firearm within the meaning of § 5-1-102(6). *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003).

Where the victim, a child, was bathed

by defendant and received second-degree burns, the physicians at the hospital determined that the child had sustained an intentionally-inflicted immersion injury in which she was forcibly held in position while immersed in scalding water, and the child still bore scars from the incident two years later, there was substantial evidence to show that the victim sustained a serious physical injury as required by subdivision (19), and defendant's conviction for first degree battery under § 5-13-201(a)(6) was proper. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003).

Cited: *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977); *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977); *Rust v. State*, 263 Ark. 350, 565 S.W.2d 19 (1978); *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978); *Fink v. State*, 265 Ark. 865, 582 S.W.2d 3 (1979); *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981); *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982); *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984); *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986); *Lair v. State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986); *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987); *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987); *Johnson v. State*, 26 Ark. App. 286, 764 S.W.2d 621 (1989); *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989); *Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991); *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992); *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993); *Gibson v. State*, 316 Ark. 705, 875 S.W.2d 58 (1994); *Hagen v. State*, 47 Ark. App. 137, 886 S.W.2d 889 (1994); *Forrest v. Ford*, 324 Ark. 27, 918 S.W.2d 162 (1996); *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997); *Beulah v. State*, 352 Ark. 472, 101 S.W.3d 802 (2003); *McCoy v. Crumby*, 353 Ark. 251, 106 S.W.3d 462 (2003); *Dutton v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 835 (Nov. 16, 2005).

5-1-103. Applicability to offenses generally.

(a) The provisions of the Arkansas Criminal Code govern a prosecution for any offense defined by the Arkansas Criminal Code and committed after January 1, 1976.

(b) Unless otherwise expressly provided, the provisions of the Arkansas Criminal Code govern a prosecution for any offense defined by a

statute not part of the Arkansas Criminal Code and committed after January 1, 1976.

(c)(1) The provisions of the Arkansas Criminal Code do not apply to the prosecution for any offense committed prior to January 1, 1976.

(2) An offense committed prior to January 1, 1976, shall be construed and punished in accordance with the law existing at the time of the commission of the offense.

(d)(1) A defendant in a criminal prosecution for an offense committed prior to January 1, 1976, may elect to have the construction and application of any defense to the prosecution governed by the provisions of the Arkansas Criminal Code.

(2)(A) An election under subdivision (d)(1) of this section shall be made by motion to the court that is to conduct the trial.

(B)(i) The motion shall be timely filed but not later than ten (10) days before the date set for the trial of the case.

(ii) However, the court for a good cause shown may entertain the motion at a later time.

(e) When all or part of a statute defining a criminal offense is amended or repealed, the statute or part of the statute that is amended or repealed remains in force for the purpose of authorizing the prosecution, conviction, and punishment of a person committing an offense under the statute or part of the statute prior to the effective date of the amending or repealing act.

History. Acts 1975, No. 280, § 102; A.S.A. 1947, § 41-102.

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

CASE NOTES

ANALYSIS

Applicability.
Applicable law.
Election.
Repealed statutes.

Applicability.

The application of subsection (d) is governed by § 5-1-111(c). *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Since the Uniform Controlled Substances Act is silent as to procedures for enhanced sentencing in cases involving multiple offenses, this section applies. *Prichard v. State*, 300 Ark. 10, 775 S.W.2d 898 (1989).

Applicable Law.

Where an offense was committed before the effective date of the criminal code and the defendant did not file a motion electing to have his trial governed by the code, preexisting law was applicable to the defendant's defenses. *Johnson v. State*, 261 Ark. 714, 551 S.W.2d 203 (1977).

Where defendant was convicted of and sentenced after the passage of the Criminal Code but prior to its effective date, it would have been improper for the trial court to have followed the Criminal Code. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980).

Where crime was committed prior to the effective date of the criminal code, the courts would look to the statute applicable at the time the crime was committed to determine whether the passage of time prevented prosecution of the defendant. *Iberg v. Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985).

Election.

Court was not required to proceed under the new code where a timely request for the application of the new criminal code as required by subsection (d) had not been made and since no good cause was shown as to why the motion should be entertained at a later time. *Clark v. State*, 260 Ark. 479, 541 S.W.2d 683 (1976).

Although a defendant in a prosecution for an offense committed prior to the effective date of the code may elect to have the construction and application of any defense to the prosecution governed by code provisions, the state has no election. *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979), overruled on other grounds by *Iberg v. Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985).

Repealed Statutes.

Defendant convicted on a plea of *nolo contendere* to sexual misconduct was not entitled to an arrest of judgment; although § 5-14-107, the statute defining sexual misconduct as a criminal offense, was repealed before defendant entered his plea of *nolo contendere*, the statute was in

effect at the time he committed the offense. *Holt v. State*, 85 Ark. App. 151, 147 S.W.3d 699 (2004).

Cited: *Long v. State*, 260 Ark. 417, 542 S.W.2d 742 (1976); *Butler v. State*, 261 Ark. 369, 549 S.W.2d 65 (1977); *Walker v. State*, 263 Ark. 485, 565 S.W.2d 605 (1978); *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978); *Cox v. Hutto*, 476 F. Supp. 906 (E.D. Ark. 1979); *Mabry v. Klimas*, 448 U.S. 444, 100 S. Ct. 2755, 65 L. Ed. 2d 897 (1980); *Klimas v. State*, 271 Ark. 508, 609 S.W.2d 46 (1980); *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985); *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995); *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

5-1-104. Territorial applicability.

(a) A person may be convicted under a law of this state of an offense committed by his or her own or another person's conduct for which he or she is legally accountable if:

(1) Either the conduct or a result that is an element of the offense occurs within this state;

(2) Conduct occurring outside this state constitutes an attempt to commit an offense within this state;

(3) Conduct occurring outside this state constitutes a conspiracy to commit an offense within this state and an overt act in furtherance of the conspiracy occurs within this state;

(4) Conduct occurring within this state establishes complicity in the commission of, or an attempt, solicitation, or conspiracy to commit, an offense in another jurisdiction that is also an offense under the law of this state;

(5) The offense consists of the omission to perform a legal duty imposed by a law of this state based on domicile, residence, or a relationship to a person, thing, or transaction in the state; or

(6) The offense is defined by a statute of this state that expressly prohibits conduct outside the state and the conduct bears a reasonable relation to a legitimate interest of this state and the person knows or should know that his or her conduct is likely to affect that legitimate interest of this state.

(b) When the offense is homicide, either the death of the victim or the physical contact causing death constitutes a "result" within the meaning of subdivision (a)(1) of this section.

History. Acts 1975, No. 280, § 103; A.S.A. 1947, § 41-103.

CASE NOTES**Jurisdiction.**

When reviewing the evidence on a jurisdictional question, the court of appeals need only determine whether there is substantial evidence to support the finding of jurisdiction. *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994).

There was jurisdiction to try and convict defendant of pandering, pursuant to § 5-27-304(a), where he emailed photographs of himself, nude, and other minors engaging in sexual activities from his

home in another state to an address in Arkansas; there was jurisdiction pursuant to subdivision (a)(1) of this section because defendant's conduct, as well as the result of his conduct, occurred within Arkansas, where the photos were received. *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003).

Cited: *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985); *Sanders v. State*, 312 Ark. 11, 846 S.W.2d 651 (1993).

5-1-105. Offenses — Court authority not limited.

(a) An offense is conduct for which a sentence to a term of imprisonment or fine or both is authorized by statute.

(b) An offense is classified as follows:

- (1) Felony;
- (2) Misdemeanor; or
- (3) Violation.

(c) Nothing in the Arkansas Criminal Code shall be construed to limit the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, judgment, or decree.

History. Acts 1975, No. 280, § 111; A.S.A. 1947, § 41-111.

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

CASE NOTES

Cited: *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992); *Vachon v. City of Fort Smith*, 308 Ark. 636, 826 S.W.2d 277 (1992).

5-1-106. Felonies.

(a) An offense is a felony if the offense is designated a felony by:

- (1) The Arkansas Criminal Code; or
- (2) A statute not a part of the Arkansas Criminal Code.

(b) A felony is classified as follows:

- (1) Class Y felony;
- (2) Class A felony;
- (3) Class B felony;
- (4) Class C felony; or
- (5) Class D felony.

(c)(1) Any felony defined by a statute not a part of the Arkansas Criminal Code that does not specify the class of the felony or prescribe a limitation on a sentence to imprisonment upon conviction of the felony is a Class D felony.

(2) Any felony defined by a statute not a part of the Arkansas Criminal Code that does prescribe a limitation on a sentence to imprisonment upon conviction of the felony is an unclassified felony.

History. Acts 1975, No. 280, § 112; **Meaning of “Arkansas Criminal Code”.** See note to § 5-1-101.

CASE NOTES

Sentence.

If the maximum sentence for an offense was death or confinement in the penitentiary then, even though a lesser sentence was imposed, the offense was deemed a

felony. *Merritt v. Jones*, 259 Ark. 380, 533 S.W.2d 497 (1976) (decision under prior law).

Cited: *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985).

5-1-107. Misdemeanors.

(a) An offense is a misdemeanor if the offense is:

(1) Designated a misdemeanor by the Arkansas Criminal Code;

(2) Designated a misdemeanor by a statute not a part of the Arkansas Criminal Code, except as provided in § 5-1-108; or

(3) Not designated a felony and a sentence to imprisonment is authorized upon conviction.

(b) A misdemeanor is classified as follows:

(1) Class A misdemeanor;

(2) Class B misdemeanor; or

(3) Class C misdemeanor.

(c)(1) Any misdemeanor defined by a statute not a part of the Arkansas Criminal Code that does not specify the class of the misdemeanor or prescribe a limitation on a sentence to imprisonment upon conviction of the misdemeanor is a Class A misdemeanor.

(2) Any misdemeanor defined by a statute not a part of the Arkansas Criminal Code that does prescribe a limitation on a sentence to imprisonment upon conviction of the misdemeanor is an unclassified misdemeanor.

History. Acts 1975, No. 280, § 113; A.S.A. 1947, § 41-113.

Meaning of “Arkansas Criminal Code”. See note to § 5-1-101.

Cross References. Ordinances punishing act made misdemeanor by state law, penalties, §§ 14-55-501, 14-55-502.

CASE NOTES

Cited: *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985); *Duhon v. State*, 299 Ark. 503, 774 S.W.2d 830 (1989).

5-1-108. Violations.

(a) An offense is a violation if the offense is designated a violation by:

(1) The Arkansas Criminal Code; or

(2) A statute not a part of the Arkansas Criminal Code.

(b) Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of the Arkansas Criminal Code if the statute defining the offense provides that no sentence other than a fine, fine or forfeiture, or civil penalty is authorized upon conviction.

History. Acts 1975, No. 280, § 114; A.S.A. 1947, § 41-114.

Meaning of “Arkansas Criminal Code”. See note to § 5-1-101.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

CASE NOTES

Cited: Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989); McKinney v. City of El Dorado, 308 Ark. 284, 824 S.W.2d 826 (1992); Vachon v. City of Fort Smith, 308 Ark. 636, 826 S.W.2d 277 (1992); State v. Bickerstaff, 320 Ark. 641, 899 S.W.2d 68 (1995); State v. Roberts, 321 Ark. 31, 900 S.W.2d 175 (1995).

5-1-109. Statute of limitations.

(a) A prosecution for murder may be commenced at any time.

(b) Except as otherwise provided in this section, a prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:

(1)(A) Class Y felony or Class A felony, six (6) years.

(B) However, for rape, § 5-14-103, the period of limitation may be extended to fifteen (15) years during which extended time a prosecution for rape may be commenced if based upon forensic deoxyribonucleic acid (DNA) testing or another test that may become available through an advance in technology;

(2) Class B felony, Class C felony, Class D felony, or an unclassified felony, three (3) years; and

(3) Misdemeanor or violation, one (1) year.

(c) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for:

(1) Any offense involving either fraud or breach of a fiduciary obligation, within one (1) year after the offense is discovered or should reasonably have been discovered by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense; and

(2)(A) Any offense that is concealed involving felonious conduct in office by a public servant at any time within five (5) years after he or she leaves public office or employment or within five (5) years after the offense is discovered or should reasonably have been discovered, whichever is sooner.

(B) However, in no event does this subdivision (c)(2) extend the period of limitation by more than ten (10) years after the commission of the offense.

(d) A defendant may be convicted of any offense included in the offense charged, notwithstanding that the period of limitation has expired for the included offense, if as to the offense charged the period of limitation has not expired or there is no period of limitation, and there is sufficient evidence to sustain a conviction for the offense charged.

(e)(1) For the purposes of this section, an offense is committed either when:

(A) Every element occurs; or

(B) If a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity in the course of conduct is terminated.

(2) Time starts to run on the day after the offense is committed.

(f) A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay.

(g) The period of limitation does not run:

(1)(A) During any time when the accused is continually absent from the state or has no reasonably ascertainable place of abode or work within the state.

(B) However, in no event does this subdivision (g)(1) extend the period of limitation otherwise applicable by more than three (3) years; or

(2) During any period when a prosecution against the accused for the same conduct is pending in this state.

(h) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) of this section has not expired since the victim has reached eighteen (18) years of age:

- (1) Battery in the first degree, § 5-13-201;
- (2) Battery in the second degree, § 5-13-202;
- (3) Aggravated assault, § 5-13-204;
- (4) Terroristic threatening in the first degree, § 5-13-301;
- (5) Kidnapping, § 5-11-102;
- (6) False imprisonment in the first degree, § 5-11-103;
- (7) Permanent detention or restraint, § 5-11-106;
- (8) Rape, § 5-14-103;
- (9) Sexual assault in the first degree, § 5-14-124;
- (10) Sexual assault in the second degree, § 5-14-125;
- (11) Sexual assault in the third degree, § 5-14-126;
- (12) Sexual assault in the fourth degree, § 5-14-127;

- (13) Incest, § 5-26-202;
 - (14) Endangering the welfare of a minor in the first degree, § 5-27-205;
 - (15) Permitting abuse of a minor, § 5-27-221(a)(1) and (3);
 - (16) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;
 - (17) Transportation of minors for prohibited sexual conduct, § 5-27-305;
 - (18) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;
 - (19) Producing, directing, or promoting a sexual performance by a child, § 5-27-403;
 - (20) Computer child pornography, § 5-27-603;
 - (21) Computer exploitation of a child in the first degree, § 5-27-605; and
 - (22) Criminal attempt, criminal solicitation, or criminal conspiracy to commit any offense listed in this subsection, §§ 5-3-201, 5-3-202, 5-3-301, and 5-3-401.
- (i) If there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.
 - (j) When deoxyribonucleic acid (DNA) testing implicates a person previously identified through a search of the State DNA Data Base or National DNA Index System, no statute of limitation that would otherwise preclude prosecution of the offense precludes the prosecution until a period of time following the implication of the person by deoxyribonucleic acid (DNA) testing has elapsed that is equal to the otherwise applicable limitation period.

History. Acts 1975, No. 280, § 104; 1981, No. 620, § 1; A.S.A. 1947, § 41-104; Acts 1987, No. 484, § 1; 1987, No. 586, § 1; 2001, No. 920, § 1; 2001, No. 1780, § 2; 2003, No. 1087, § 8; 2003, No. 1390, § 1; 2005, No. 2250, § 1.

A.C.R.C. Notes. Acts 2001, No. 1780, § 1, provided: "The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence."

Publisher's Notes. This section may have impliedly repealed Rev. Stat., ch. 45, §§ 250-254, or portions of Rev. Stat., ch. 45, §§ 250-254.

Rev. Stat., ch. 45, § 250, provided that any person could be prosecuted, tried, and punished for any offense punishable with death at any time after the offense was committed. Rev. Stat., ch. 45, § 251, further provided that no person was to be prosecuted, tried, and punished for non-capital felonies, other than certain cases of embezzlement, unless an indictment was found within three years after the commission of the offense. Rev. Stat., ch. 45, § 252, provided that no person was to be tried, prosecuted, and punished for any offense less than felony, or any fine or forfeiture, unless the indictment was found or the prosecution instituted within one year after the commission of the offense or incurring of the fine or forfeiture. Rev. Stat., ch. 45, § 253, added that, in all cases, time in which the defendant was a

nonresident was not to constitute part of the limitation of §§ 250-252, and §§ 251 and 252 were not to avail any person who should flee from justice. Finally, Rev. Stat., ch. 45, § 254, provided that when any indictment or prosecution should be quashed, set aside, or reversed, the time during which the indictment or prosecution was pending was not to be computed as part of the time of the limitation prescribed for the offense.

However, in *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979), the Arkansas Supreme Court held that there is no irreconcilable conflict between this section and Rev. Stat., ch. 45, § 251, when the latter is applied only to offenses committed prior to January 1, 1976, the effective date of the Criminal Code.

Amendments. The 2001 amendment by No. 920 added “except rape ... through advances in technology” in (b)(1); and added “and” in (b)(2).

The 2001 amendment by No. 1780 added (i).

The 2003 amendment by No. 1087 added (h)(17) and (18).

The 2003 amendment by No. 1390 rewrote (h)(7)-(9); inserted present (h)(10) and (11); redesignated former (h)(10)-(14) as present (h)(12)-(16); and substituted “abuse of a child” for “child abuse” in present (h)(14).

The 2005 amendment added (j).

Cross References. Physical evidence in sex offense prosecutions — Retention and disposition, § 12-12-104.

RESEARCH REFERENCES

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

Survey — Criminal Law, 10 UALR L.J. 559.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

CASE NOTES

ANALYSIS

Applicability.

Aggrieved party.

Arrest warrant, other process, etc.

Authority of court.

Burden of proof.

Commencement of prosecution.

Continuing crime.

Evidence.

Homicide.

Public officer.

Sentences.

Tolling the statute.

Waiver.

Applicability.

Where defendant was charged with willfully attempting to evade or defeat the payment of tax, in violation of § 26-18-201(a), and was convicted of failure to pay tax, in violation of § 26-18-202, the six-year statute of limitations under § 26-18-306(j) was applicable rather than the more general three-year limitations period under subdivision (b)(2) of this section; section 26-18-306(j) specifically pro-

vides a six-year limitations period for prosecutions for any of the various criminal offenses arising under the provisions of any state tax law, and it is a well-settled principle of law that a general statute does not apply when a specific one governs the subject matter. *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003).

Where defendant was convicted for failing to pay child support for six years, subdivision (b)(2) of this section did not limit the restitution order to three years because the statute limited prosecutions, not restitution. *Hampton v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 320 (May 20, 2004).

Aggrieved Party.

The “aggrieved party” in a criminal context is the victim of the crime. *State v. Switzer*, 305 Ark. 158, 806 S.W.2d 368 (1991).

The state or public is the “aggrieved party” with respect to offenses of public servant bribery and hindering apprehension or prosecution. *State v. Switzer*, 305 Ark. 158, 806 S.W.2d 368 (1991).

Arrest Warrant, Other Process, Etc.

A traffic citation is embraced within the statutory term "other charging instrument" that is required in initiating a prosecution; where citation is delivered immediately following arrest, the one-year limitation on misdemeanor charges is not applicable. *Thompson v. City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978).

Arrest warrant held invalid as being both defective and "stale." *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Authority of Court.

The one year allowed for prosecution of misdemeanors is more than an ordinary statute of limitations as it goes to the court's power to try the case. *McIlwain v. State*, 226 Ark. 818, 294 S.W.2d 350 (1956) (decision under prior law).

Where the offense did not fall within any of the exceptions provided in the former provision, similar to subsection (c), the peace court was without jurisdiction to try defendant for the offense where a warrant was not issued within the statutory period after the alleged commission of the offense. *Savage v. Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965) (decision under prior law).

Burden of Proof.

State must prove that the offense was committed within the statutory period or else that the running of the statute has been suspended. *James v. State*, 110 Ark. 170, 160 S.W. 1090 (1913) (decision under prior law).

Commencement of Prosecution.

Defendant's prosecution for murder held not invalidated by delay between the commission of the offense and his arrest. *Beckwith v. State*, 238 Ark. 196, 379 S.W.2d 19 (1964) (decision under prior law).

No harm came to the defendant's defense as a result of the delay between the date the offense occurred and the date charges were filed since the charges were filed well within the statute of limitations. *Alexander v. State*, 257 Ark. 343, 516 S.W.2d 368 (1974) (decision under prior law).

Where, although the statute of limitations had not run, there was a delay in filing the charge or initiating prosecution and there was consequent prejudice to the

defense, the charge would be dismissed unless the state could demonstrate a satisfactory reason for the delay. *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978).

Where, although the action was commenced within the statutory time limit, there was a delay in filing charges or initiating prosecution and there was no indication that the prosecution delayed in order to gain a tactical advantage, the state did not create prejudicial error in failing to bring charges against the defendants at an earlier date. *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), *aff'd*, 288 Ark. 546, 708 S.W.2d 74 (1986).

The one-year statute of limitation applicable to misdemeanor charges did not bar conviction where the prosecution was commenced when the arrest warrant was issued, based upon the information filed that same date, and because this occurred well within the period of one year from the date the offense was committed. *Deweese v. State*, 26 Ark. App. 126, 761 S.W.2d 945 (1988).

The offense of theft of public benefits is a continuing offense and, therefore, the statute of limitations had not expired when the prosecution of the defendant was commenced, even though the defendant completed two of her applications for public benefits more than three years before the prosecution commenced and even though the record did not establish exactly when she received the first illegal benefits, as the prosecution was commenced within three years of her last application. *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000).

A prosecution was properly commenced on January 23, 1997, where an information was filed and a summons issued on that date, notwithstanding that the defendant did not make her first appearance until November 10, 1997, as the delays in executing the summons were reasonable. *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000).

Under subsection (h) of this section, the statute of limitations was extended for felonies such as rape up to six years beyond the eighteenth birthday of the victim and, for felonies such as first-degree sexual abuse, up to three years beyond the eighteenth birthday of the victim, regardless of the victim's age at the time of the

offense. *Gardner v. State*, 76 Ark. App. 258, 64 S.W.3d 761 (2001).

The passage of subsection (h) of this section extended the statute of limitations for offenses involving minors and applied retroactively to allow prosecution of certain offenses involving child victims. *Dye v. State*, 82 Ark. App. 189, 119 S.W.3d 513 (2003).

Trial court did not err in denying defendant's motion dismiss or motion for a directed verdict as felony nonsupport was a continuing offense and defendant was charged within three years of committing the offense. *Morris v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 767 (Nov. 3, 2004).

Continuing Crime.

Where defendant was convicted for failing to pay child support for six years, subdivision (b)(2) of this section did not bar the prosecution for the failure to pay support more than three years before defendant was charged because nonsupport was a continuing crime. *Hampton v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 320 (May 20, 2004).

Evidence.

Evidence held sufficient to find that an offense was committed within the statute of limitations. *Fain v. State*, 189 Ark. 474, 74 S.W.2d 248 (1934); *Guise v. State*, 198 Ark. 767, 131 S.W.2d 631 (1939) (preceding decisions under prior law).

Homicide.

Since a defendant does not commit the offense of manslaughter until the victim dies, the statute of limitations does not begin to run until that date. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Public Officer.

The five-year statute of limitations applied where the offense that was concealed involved felonious conduct in office by a public servant. *Clark v. State*, 308 Ark. 453, 824 S.W.2d 345 (1992).

Sentences.

No mention is made in this section of a limitation on when a warrant or summons can be issued to show cause why the defendant should not be jailed for failure to pay a fine imposed as a sentence after a conviction for an offense. *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994).

Tolling the Statute.

Where under former similar section, resident referred to a person who was physically present in the state and, where petitioner had not been a resident of the state for part of the time between the commission of an offense and his conviction, the statute of limitations had not run. *Grayer v. State*, 234 Ark. 548, 353 S.W.2d 148 (1962) (decision under prior law).

The misdemeanor prosecution of defendant was not tolled under subdivision (g)(2) of this section as the state failed to file an information relating to the defendant's felony arrest warrant and, therefore, no felony prosecution was ever commenced. *McGrew v. State*, 338 Ark. 30, 991 S.W.2d 588 (1999).

Waiver.

The limitation provided by former similar section was not waived by failure to plead. *Savage v. Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965) (decision under prior law).

Cited: *State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978); *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979); *Iberg v. Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985); *Mullenax v. Langston*, 286 Ark. 470, 692 S.W.2d 755 (1985); *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985); *Bonds v. State*, 296 Ark. 1, 751 S.W.2d 339 (1988); *State v. Mazur*, 312 Ark. 121, 847 S.W.2d 715 (1993); *Westark Christian Action Council v. Stodola*, 312 Ark. 249, 848 S.W.2d 935 (1993); *Richmond v. State*, 326 Ark. 728, 934 S.W.2d 214 (1996).

5-1-110. Conduct constituting more than one offense — Prosecution.

(a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if:

(1) One (1) offense is included in the other offense, as defined in subsection (b) of this section;

(2) One (1) offense consists only of a conspiracy, solicitation, or attempt to commit the other offense;

(3) Inconsistent findings of fact are required to establish the commission of the offenses;

(4) The offenses differ only in that one (1) offense is defined to prohibit a designated kind of conduct generally and the other offense to prohibit a specific instance of that conduct; or

(5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that a specific period of the course of conduct constitutes a separate offense.

(b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:

(1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

(c) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.

(d)(1) Notwithstanding any provision of law to the contrary, a separate conviction and sentence are authorized for:

(A) Capital murder, § 5-10-101, and any felony utilized as an underlying felony for the capital murder;

(B) Murder in the first degree, § 5-10-102, and any felony utilized as an underlying felony for the murder in the first degree; and

(C) Continuing criminal enterprise, former § 5-64-414, and any predicate felony utilized to prove the continuing criminal enterprise.

(2) Pursuant to § 5-4-403, with respect to any offense mentioned in subdivision (d)(1) of this section the trial judge may order that the multiple terms of imprisonment run concurrently or consecutively.

History. Acts 1975, No. 280, § 105; A.S.A. 1947, § 41-105; Acts 1995, No. 657, § 2.

A.C.R.C. Notes. The reference in subdivision (d)(1)(C) of this section to § 5-64-414 is a reference to the former provisions of § 5-64-414. Acts 2005, No. 1994, § 306, rewrote § 5-64-414 and repealed its provisions concerning the continuing criminal enterprise offense. Similar provisions

to the former continuing criminal enterprise offense are now codified in § 5-64-405 which was rewritten to include those provisions by Acts 2005, No. 1994, § 305[A].

Acts 1995, No. 657, § 1, provided: "It is the intent of the legislature, pursuant to *Missouri v. Hunter*, 459 U. S. 359 (1983), to explicitly authorize separate convictions, sentences, and cumulative punish-

ments for the offenses specified in Section 2 of this act. Cases such as McClendon v. State, 295 Ark. 303, 748 S. W. 2d 641 (1988), which prohibit separate convictions, sentences, and cumulative punishments for such offenses are hereby overruled."

RESEARCH REFERENCES

ALR. Propriety of lesser included offense charge in state prosecution of narcotics defendant — Marijuana cases. 1 A.L.R.6th 549.

Propriety of lesser included offense charge in state prosecution of narcotics defendant-Cocaine cases. 2 A.L.R.6th 551.

Ark. L. Rev. Note, Missouri v. Hunter and the Legislature: Double Punishment Without Double Jeopardy, 37 Ark. L. Rev. 1000.

Note, United States v. Dixon: What Does "Same Offense" Really Mean?, 48 Ark. L. Rev. 709.

Publisher's Notes. Catt v. State, 285 Ark. 691, 691 S.W.2d 120 (1985), which discussed this section in part, was a fictional case written in honor of April Fool's Day and ought not to be relied upon as an official opinion of the Arkansas Supreme Court.

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

Survey — Criminal Law, 10 UALR L.J. 137.

Survey — Criminal Law, 12 UALR L.J. 183.

Note, Constitutional Law — Goodbye Grady! Blockburger Wins the Double Jeopardy Rematch: United States v. Dixon, 113 S. Ct. 2849 (1993), 17 UALR L.J. 369.

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Purpose.

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The purpose of this section is to allow a conviction of a lesser included offense when the accused is not convicted of the greater offense and to prohibit an accused from being convicted of more than one offense when the proof required to establish the offense necessarily includes proof of every element of another. *Handy v. State*, 24 Ark. App. 122, 749 S.W.2d 683 (1988).

Applicability.

Unless an offense is defined as a "continuing course of conduct crime," this section does not apply. *Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994).

A defendant cannot object to a double jeopardy violation until he has actually been convicted of the multiple offenses because it is not a violation of double jeopardy under subsection (a)(1) of this section for the state to charge and prosecute on multiple and overlapping charges; it is only after the jury returns guilty verdicts on both offenses that the trial court is required to determine whether convictions could be entered as to both based on the same conduct. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001).

Continuing Criminal Enterprise.

Simultaneous convictions and sentences for continuing criminal enterprise and its predicate felony offenses do not violate the protection against multiple punishments for the same offense afforded by the federal and Arkansas constitutional double jeopardy clauses, U.S. Const. Amend. 5 and Ark. Const., Art. 2, § 8. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995).

Based on examination of § 5-64-414

and this section, as amended by Acts 1995, No. 595, the General Assembly intended to authorize separate punishments for violations of § 5-64-414 and the underlying substantive predicate offenses. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995).

Continuing Offenses.

A continuing offense must be a continuous act or series of acts set on foot by a single impulse and operated by an intermittent force. *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981); *Watson v. State*, 295 Ark. 616, 752 S.W.2d 240 (1988).

Subdivision (a)(5) of this section did not change the common law rule that when the impulse is single only one charge lies, no matter how long the action may continue, however, if successive impulses are separately given, even though all unite in swelling a common stream of action, separate charges lie; the test is whether the individual acts are prohibited or the course of action they constitute is prohibited, if the former, each act is punished separately, if the latter, there can be but one penalty. *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981).

Certain offenses held not to be defined as constituting a course of conduct. *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981).

Acts held not to be one continuous offense so as to prohibit defendant from being convicted of several offenses. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984).

Rape is not defined as a continuing offense; it is a single crime that may be committed in either of two ways, by engaging in sexual intercourse or deviate sexual activity with another person by forcible compulsion. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

Where the defendant committed three acts of aggravated robbery separated in point of time and place, there was not a single continuing offense and the trial court did not err in convicting and sentencing him for three offenses. *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986).

Subdivision (a)(5) of this section is not applicable where defendant is charged with two separate offenses and for different conduct for each offense; thus, defendant cannot be charged with several counts for the same continuous crime. *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

Aggravated robbery is not a continuing offense. *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

Aggravated robbery and aggravated assault, arising from the same incident, overlap. *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

For subdivision (a)(5) of this section to be applicable, the conduct must be defined as a continuing course of conduct crime. *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987); *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

Neither terroristic threatening nor false imprisonment is defined as a continuing offense and, because neither offense is defined as a continuing course of conduct, subdivision (a)(5) of this section has no application. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

Neither manslaughter nor second degree battery is specifically defined as a continuing course of conduct. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

The crime of committing a terroristic act is not a continuous course of conduct crime and, therefore, the defendant was properly convicted of three separate terroristic acts where he fired three quick, successive shots into his girlfriend's apartment. *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999).

Instructions.

Court held to have acted properly in not giving instruction on lesser included offense. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977); *Hair v. State*, 266 Ark. 583, 587 S.W.2d 34 (1979); *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981); *Smith v. State*, 277 Ark. 403, 642 S.W.2d 299 (1982); *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

The trial court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a possible verdict acquitting the defendant of the offense charged and for convicting of

defendant the included offense. *Crenshaw v. State*, 271 Ark. 484, 609 S.W.2d 120 (Ct. App. 1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981); *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983); *Roberts v. State*, 281 Ark. 218, 663 S.W.2d 178 (1984); *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

It is not error to refuse to instruct the jury on a lesser included offense where the evidence clearly shows that the defendant is either guilty of the greater offense or innocent. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Refusal to give correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense or where there is the slightest evidence tending to disprove one of the elements of the larger offense is error. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because, absent such evidence, there is no reasonable basis for finding an accused guilty of the lesser offense. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Trial court erred in failing to give instruction on lesser included offense. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983); *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

When the jury convicts a defendant of a serious offense rather than a less serious included offense about which the jury was also instructed, the court's refusal to submit a third offense that is included but is even less serious than the other two cannot be prejudicial. *McKinnon v. State*, 287 Ark. 1, 695 S.W.2d 826 (1985), cert. denied, 501 U.S. 1208, 111 S. Ct. 2805, 115 L. Ed. 2d 978 (1991).

In a prosecution for forgery, the trial court did not err by refusing to instruct the jury on the lesser included offense of criminal attempt to commit forgery; the crime of forgery was complete upon the defendant's being in possession of the forged instrument, upon his attempt to pass the check, or upon his passing of the check, and the defendant was either guilty

of forgery or nothing. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

Where the defendant was charged with homicide in the course of a burglary, the failure to instruct on first degree murder was not reversible error because the objection of counsel was that the court should have given the instruction because of evidence, which counsel could not recite, that the defendant entered the victim's residence for a purpose other than to commit a burglary. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

A lesser included offense instruction need not be given unless there is a rational basis. *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986); *Whitener v. State*, 311 Ark. 377, 843 S.W.2d 853 (1992).

In prosecution for rape of his daughter, where defendant's defense was one of complete innocence and that nothing improper occurred between him and his daughter, he was not entitled to jury instructions on the lesser included offenses of carnal abuse in the third degree and sexual misconduct. *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986).

The trial court is not obligated to charge the jury with respect to a lesser included offense when there is no rational basis for the jury to find appellant guilty of a lesser included offense. *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

Subsection (c) of this section does not delegate the decision regarding the propriety of a lesser included offense instruction to the defendant but, rather, requires the trial court to determine whether the proffered instruction concerns a lesser included offense and, if so, whether a rational basis exists for a verdict acquitting the defendant of the greater offense and convicting him of the lesser. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

Although there was no evidence to support the lesser-included-offense instruction at the time the instructions were discussed, the court had been alerted by defense counsel that such evidence was forthcoming and should have withheld ruling on the instructions pending presentation of the defense case. *Allen v. State*, 53 Ark. App. 225, 920 S.W.2d 860 (1996), aff'd, 326 Ark. 541, 932 S.W.2d 764 (1996).

Lesser Included Offenses.

Where the offense of which defendant was found guilty is a lesser included of-

fense of that offense with which he was charged, he is in no position to complain of being convicted of the lesser crime. *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977).

Offenses held not to be lesser included offenses. *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979); *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985).

Where, in proving a specified offense, there must be proof of the same or less than all the elements required to establish the commission of a greater offense, the specified offense is thus an included offense which falls within the double conviction prohibition of this section, and the double jeopardy prohibition of the Fifth Amendment of the United States Constitution. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

Court could include offense as a lesser included offense pursuant to subsection (b). *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981).

Conviction held to be proper under subdivision (b)(3) as a lesser included offense. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Offense held to be a lesser included offense of another offense. *Martin v. State*, 277 Ark. 175, 639 S.W.2d 738 (1982); *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983); *James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983).

Where an offense requires proof of a fact which is not an element in the proof of another greater offense, the lesser offense is not included in the greater offense. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

An offense is not a lesser included offense solely because a greater offense includes all of the elements of an underlying offense; the lesser included offense doctrine additionally requires that the two crimes be of the same generic class and that the differences between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Offenses held to be of a different nature and not of the same generic class and, consequently, one offense was not a lesser

offense included within the other. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Offense held not to be a lesser included offense of another because the two offenses each contain an element that the other does not; therefore, the two crimes do not meet the statutory definition of an included offense since one offense is not established by proof "of the same or less" than the elements required to prove the other greater offense. *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.; *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985).

When the commission of a criminal offense by definition cannot be established without the commission of any underlying criminal offense, convictions for both offenses are barred by this section. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987); *Ballew v. State*, 298 Ark. 175, 766 S.W.2d 14 (1989).

Since rape and attempted rape are lesser included offenses of capital murder, it was error for the defendant to be convicted and sentenced for attempted rape. *Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988).

A arson is neither a lesser offense included within conspiracy to commit theft by deception nor an "element included offense" of conspiracy to commit theft by deception. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Trial court did not err in refusing to reduce charge to second-degree murder on double jeopardy grounds. *Lamb v. State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988).

Neither rape nor kidnapping is a lesser included offense of the other, as each involves separate elements, and it is not necessary to prove one offense in order to prove the other. *Handy v. State*, 24 Ark. App. 122, 749 S.W.2d 683 (1988).

A kidnapping which qualifies as a Class B felony is not a lesser included offense of a kidnapping which constitutes a Class Y felony. Rather, the offense is still kidnapping, even when there is a voluntary, safe release of the victim. *Woods v. State*, 302 Ark. 512, 790 S.W.2d 892 (1990).

An offense is not a lesser included of-

fense solely because a greater offense includes all the elements of the lesser offense; the lesser included offense doctrine additionally requires that the two offenses be of the same generic class and that the difference between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability. *Ritchie v. State*, 31 Ark. App. 177, 790 S.W.2d 919 (1990).

Aggravated robbery is not a “lesser included offense” of capital felony murder because robbery and murder are not in the same generic class; however, aggravated robbery is an “element included offense” of capital felony murder because, by statutory definition, capital murder could not be committed without committing aggravated robbery in a case where aggravated robbery is the underlying felony supporting the capital murder charge. *Mullins v. State*, 303 Ark. 695, 799 S.W.2d 550 (1990).

Rape and first degree battery are separate and distinct crimes with different elements of proof; and neither is a crime which can be subsumed under the other. *Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991).

Where defendant was convicted of both attempted capital murder, ostensibly the more serious crime, which was a Class A felony, and aggravated robbery, a Class Y felony, the trial court properly set aside the attempted capital murder conviction based on the classification of the crime, rather than whether it was a lesser included offense. *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991).

Aggravated and first degree assault are not lesser included offenses of resisting arrest. *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

Violation of the implied consent law is not a lesser included offense of driving while intoxicated, and the offense of driving while intoxicated is not a lesser included offense of violation of the implied consent law. *Frana v. State*, 323 Ark. 1, 912 S.W.2d 930 (1996).

In a prosecution for kidnapping, aggravated robbery, and theft of property, the defendant was not entitled to have the jury instructed with regard to false imprisonment as a lesser included offense since his defense was based on a denial of all charges and, thus, his instruction re-

quest was inconsistent with his own proof. *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000).

There was no double jeopardy violation where a defendant was convicted of both possession with intent to deliver a controlled substance and simultaneous possession of drugs and firearms, notwithstanding that possession of a controlled substance with intent to sell is an included offense within simultaneous possession of a controlled substance and a firearm, since the General Assembly made it clear that it wished to assess an additional penalty for simultaneously possessing controlled substances and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Driving while intoxicated is a lesser included offense of negligent homicide; therefore, the trial court erred in sentencing the defendant separately on that count. *Montague v. State*, 68 Ark. App. 145, 5 S.W.3d 101 (1999), *aff'd*, 341 Ark. 144, 14 S.W.3d 867 (2000).

Felony manslaughter is not a lesser included offense of capital felony murder or first-degree felony murder. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

There was no violation of this section where the defendant was convicted of both manufacturing methamphetamine and possession of methamphetamine with intent to distribute, since the latter crime is not a lesser included offense of the former crime. *Cothren v. State*, 344 Ark. 697, 42 S.W.3d 543 (2001).

Trial court was not obligated under subsection (c) to instruct the jury on second degree murder as a lesser included offense where there sufficient corroborated testimony and medical evidence supporting a verdict of first degree murder. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

Sections 5-27-303(b) and 5-27-403(a) constituted two separate offenses in that the actor and prohibited conduct in § 5-27-303(b) was different from the actor and prohibited conduct in § 5-27-403(a); as a guardian to the child, defendant husband's conduct was prohibited under § 5-27-303(b), and under § 5-27-403(a), defendant was a person who produced, directed, or promoted a website which

included photographs depicting the lewd exhibition of the breasts of a female and the genitals or pubic area of the child, who was younger than 17. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

Operation of a vehicle without a valid license plate in violation of § 27-14-304 is not a lesser included offense of willfully attempting to evade or defeat the payment of tax, in violation of § 26-18-201(a), and failure to pay tax, in violation of § 26-18-202; it is possible to commit the greater offenses without committing the offense of operating a vehicle without a license plate, and the lesser charge requires proof of an additional element not required under the greater offenses. *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003).

Defendant's conviction for first-degree murder was improper where the evidence warranted a manslaughter instruction that should have been presented to the jury; because there was evidence that warranted an instruction on a lesser-included offense, including the fact that the victim shot at defendant first until his gun jammed, it was in error to refuse to give the manslaughter instruction. *Whittier v. State*, 84 Ark. App. 362, 141 S.W.3d 924 (2004).

Court did not err in refusing to instruct the jury on sexual indecency with a child where it was not a lesser included offense of rape because committing the crime of sexual indecency with a child was not an attempt to commit rape, and the injury or risk of injury was the same for both offenses; specifically, subjecting the victim to deviate sexual activity was the injury or risk of injury for both offenses. *Pratt v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 537 (Sept. 30, 2004).

Because sexual misconduct was not a lesser-included offense of rape, the trial court did not abuse its discretion in denying defendant's proffered lesser-included instructions. *McDuffy v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 599 (Oct. 14, 2004).

Trial court erred in finding defendant guilty of second-degree forgery as it was not a lesser-included offense of first-degree forgery, set forth in the charging instrument and under which the trial proceeded; as provided in § 5-37-201(b) and (c), second-degree forgery requires proof of documents different from those for first-

degree forgery and does not meet the requirements of the tests set out in subsection (b) of this section for a lesser-included offense, therefore, they are two separate crimes. *Eagle v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 622 (Sept. 21, 2005).

Court did not err in denying an instruction on the lesser-included offense of second-degree murder where defendant was unable to point to any evidence in the record that supported a knowing mental state rather than a purposeful mental state because he proclaimed his innocence throughout the trial and even took the stand in his own defense, denying any involvement in the murder; moreover, the jury was instructed on both capital murder and first-degree murder, but convicted defendant of the greater offense of capital murder. *Flowers v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 269 (May 5, 2005).

Multiple Charges.

Subsection (a) means that a defendant may be prosecuted for more than one offense, but, under specified circumstances, a judgment of conviction may only be entered for one of the offenses. *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993).

By allowing prosecution for both conspiracy and the underlying offense, this section does not merge the inchoate offense into the ultimate offense. *Williams v. State*, 54 Ark. App. 271, 927 S.W.2d 812 (1996), rev'd on other grounds, 328 Ark. 487, 944 S.W.2d 822 (1997).

Multiple Convictions.

Where offenses are separate, a defendant who had been convicted of the several offenses was not twice placed in jeopardy by being convicted of both offenses. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977).

Where separate offenses were committed, each commencing at a distinct point in time as the result of a separate impulse, and defendant could be convicted and sentenced for both offenses. *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981).

There was error in entering a judgment of conviction on more than one offense where one of the offenses was established

by proof of less than all of the elements required to establish the commission of another offense. *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

There was no statutory or constitutional prohibition against convictions on separate counts, since, although the crimes were committed in the same escape, they were not of the same conduct because they were committed against different persons, thus they were added elements of proof as to different victims. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

Where a defendant was sentenced for several offenses, the conviction for the greater offense was affirmed, but the conviction for the lesser included offense was set aside, since subdivisions (a)(1) and (b)(1) prohibit the entry of a judgment of conviction on the greater offense and on the underlying lesser included offense. *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied, 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

Subdivision (a)(1) only prohibits two convictions where one offense is included in another; accordingly, a defendant can be convicted of one offense and acquitted of another where the offenses arise out of the same conduct, since one offense is one of the elements of proof necessary to find a defendant guilty of the second so that acquittal of the second charge is not dispositive of the first charge. *Johnson v. State*, 274 Ark. 293, 623 S.W.2d 831 (1981).

It was not improper under subdivision (a)(1) to convict defendant of a lesser offense but acquit him of the greater offense since the greater offense required proof that the defendant committed the lesser offense and another fact. *Johnson v. State*, 274 Ark. 293, 623 S.W.2d 831 (1981).

Convictions on more than one count did not violate the prohibition against double jeopardy. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

Where the prosecution of defendant for two offenses arose from the same incident, his convictions for both offenses violated the prohibition against double jeopardy since one offense was a lesser included offense of the other; therefore, his conviction and sentence for the lesser included offense would be set aside. *Brewer v. State*, 277 Ark. 40, 639 S.W.2d 54 (1982).

When there has been more than one finding of guilt resulting from the same conduct, the lesser penalty should be set aside. *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983).

When a criminal offense by definition includes a lesser offense, a conviction cannot be had for both offenses under this section. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Where it was necessary to prove the elements of one or more offenses to prove the elements of another offense, the conviction and sentence imposed for the lesser included offenses were set aside, and the conviction and sentence for the greater offense were not disturbed. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Where one offense was a lesser included offense of another, and the defendant had been convicted and sentenced for both offenses, the conviction and sentence for the lesser included offense would be set aside. *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983).

Where the defendant's convictions for two offenses grew out of a single act, and the proof required to prove the greater of the offenses necessarily included proof of the lesser offense, the defendant's conviction and sentence for the lesser offense had to be set aside. *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983).

This section prohibited a court from convicting and sentencing a defendant for several offenses involving the same victim where both charges arose from the same occurrence. *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983).

Where the same proof was required for each of two counts of an offense involving the same victim, the entry of conviction on both counts was prohibited by subdivisions (a)(1) and (b)(1). *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

Where none of the crimes was necessarily a lesser included offense of the other, since all involve separate elements, and it is not necessary to prove one offense in order to prove another, this section did not preclude defendant's conviction for all crimes charged. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984).

Where offense was not a lesser included offense of another offense, the defendant could be sentenced for both of these offenses without violating this section or the

double jeopardy clause of the Fifth Amendment to the U.S. Constitution. *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985).

Where the charges were based upon the same elements, the two felonies were merged into one, and under subdivision (b)(1) defendant could only be convicted of one offense; thus, defendant's conviction for the greater of the two offenses was affirmed and his conviction for the lesser of the two offenses was reversed and dismissed. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Where the defendant raped the victim with his finger, and then, after leaving the bedroom and returning, got an erection and penetrated her, the two acts of rape were of a different nature and were separated in point of time, and the defendant was properly convicted of two counts of rape. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

The double jeopardy clause and subsection (a) and subdivision (b)(1) of this section did not preclude the defendant's convictions of both attempted first degree murder and aggravated robbery, where the defendant held the first victim at gunpoint and examined her jewelry with the purpose of committing a theft, and then he shot the second victim. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

Battery in the first degree is distinguishable from aggravated robbery in that (1) the battery offense requires serious physical injury to another, while aggravated robbery does not, and (2) aggravated robbery requires the purpose of committing robbery while being armed with a deadly weapon, or the representation that one is so armed, while first-degree battery, by statutory definition, requires neither of these two elements. Consequently, defendant can be prosecuted for both offenses. *Robinson v. Lockhart*, 823 F.2d 210 (8th Cir. 1987).

Where the restraint exceeds that which necessarily accompanies the crime of aggravated robbery, the robber is also subject to prosecution for kidnapping. *Frenslley v. State*, 291 Ark. 268, 724 S.W.2d 165 (1987).

The criminal code does not excuse a defendant for multiple crimes committed during one escape, and so convictions for burglary and breaking or entering are

proper. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

Where evidence was sufficient to show successive and separate impulses as to theft of two persons' property, convictions on separate counts of theft were proper. *Perkins v. State*, 298 Ark. 322, 767 S.W.2d 514 (1989).

This section does not prohibit conviction for both conspiracy and the underlying substantive offense of delivery of a controlled substance where the conspiracy contemplated the commission of a series of criminal acts, not merely a single transaction. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

A jury may convict on some counts but not on others, and may convict in different degrees on some counts, because of compassion or compromise and not solely because there was insufficient evidence of guilt. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

Defendant, charged with two counts of capital murder, was properly found guilty of second-degree murder and attempted first-degree murder. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

This section does not prohibit convictions for both delivery of a controlled substance and conspiracy to deliver. *Williams v. State*, 54 Ark. App. 271, 927 S.W.2d 812 (1996), rev'd on other grounds, 328 Ark. 487, 944 S.W.2d 822 (1997).

Merger of two capital murders was not required under § 5-1-110(d)(1), and where defendant waived a sentencing hearing, thereby giving the trial court sole sentencing authority under § 5-4-103(b)(4), the trial court had the authority to order defendant's sentences to run consecutively under § 5-4-403(a). *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

Multiple convictions were not allowed where a defendant was charged with attempted capital murder and two underlying felonies, kidnapping and aggravated robbery; thus, the kidnapping charge was selected in defendant's case to merge into the attempted capital murder conviction as the General Assembly did not clearly express an intent in this section to allow for multiple convictions for each of those crimes. *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002).

Pursuant to subdivision (d)(1), defen-

dant's convictions for both first-degree murder and the underlying felony of aggravated robbery was authorized by the legislature and his convictions did not violate the federal or state Double Jeopardy Clauses. *Hudson v. State*, 85 Ark. App. 85, 146 S.W.3d 380 (2004).

Trial court did not err in sentencing defendant, who was convicted of two counts of committing a terroristic act, to 30 years' imprisonment pursuant to the "three strikes" provision of § 5-4-501 (d)(1) based on the fact that he had been convicted the previous month of three counts of aggravated robbery in an unrelated case. *Benson v. State*, 86 Ark. App. 154, 164 S.W.3d 495 (2004).

Defendant was properly convicted of capital murder and arson after he told a neighbor that his trailer home exploded while his girlfriend was inside; the constitutional prohibition against double jeopardy was not violated because subdivision (d)(1)(A) of this section permitted a sentence for both crimes. *Meadows v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 492 (Sept. 16, 2004).

Multiple Impulses.

Where the evidence displayed defendant's impulse to kidnap the victim and additional impulses to batter and threaten to kill her when she resisted the kidnapping, convictions for the separate offenses of first degree terroristic threatening (§ 5-13-301), second degree battery (§ 5-13-202), and attempted kidnapping (§ 5-3-201) were upheld because defendant's criminal acts were not all part of the attempted kidnapping and were not a continuing course of conduct. *Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994).

Defendant was properly charged with multiple counts of rape rather than one count where there were separate penetrations occurring as a result of separate impulses, notwithstanding that the acts were not separated in time. *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997).

Parole.

Denial of parole is not a new punishment for purposes of double jeopardy. *Clawitter v. Lockhart*, 286 Ark. 131, 689 S.W.2d 558 (1985).

Review.

Appeal which raised an issue of the application of subsection (c), rather than

its interpretation, did not involve the correct and uniform administration of the criminal law and was not addressed by the Supreme Court. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

A defendant is required to address the lesser included offenses in his motion for a directed verdict to preserve on appeal a challenge to the sufficiency of the evidence necessary to support a conviction for a lesser included offense; failure to question the sufficiency of the evidence for lesser included offenses, either by name or by apprising the trial court of the elements of the lesser included offenses, at the close of the state's case constituted a waiver of the argument. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

Cited: *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978); *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978); *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978); *Uitley v. State*, 266 Ark. 794, 586 S.W.2d 242 (Ct. App. 1979); *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979); *Swaite v. State*, 274 Ark. 154, 623 S.W.2d 176 (1981); *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982); *Robinson v. State*, 278 Ark. 516, 648 S.W.2d 444 (1983); *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983); *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983); *Rowe v. Lockhart*, 736 F.2d 457 (8th Cir. 1984); *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984); *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985); *Zones v. State*, 287 Ark. 483, 702 S.W.2d 1 (1985); *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986); *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986); *Watson v. State*, 290 Ark. 484, 720 S.W.2d 310 (1986); *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988); *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989); *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990); *Jeffers v. State*, 301 Ark. 590, 786 S.W.2d 114 (1990); *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990); *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991); *Frazier v. State*, 309 Ark. 228, 828 S.W.2d 838 (1992); *Bonds v. State*, 310 Ark. 541, 837 S.W.2d 881 (1992); *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Patrick v. State*, 314 Ark. 285, 862 S.W.2d 239 (1993); *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996); *Sherman v. State*, 326 Ark. 153,

931 S.W.2d 417 (1996); *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001); *Wyatt v. State*, 75 Ark. App. 1, 54 S.W.3d 549 (2001); *Hardman v. State*, 356 Ark. 7, 144 S.W.3d 744 (2004); *Porter v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 489 (Sept. 16, 2004); *Harper v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 555 (Oct. 7, 2004).

5-1-111. Burden of proof — Defenses and affirmative defenses — Presumption.

(a) Except as provided in subsections (b), (c), and (d) of this section, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

- (1) Each element of the offense;
- (2) Jurisdiction;
- (3) Venue; and
- (4) The commission of the offense within the time period specified in § 5-1-109.

(b) The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

(c)(1) The issue of the existence of a defense does not need to be submitted to the jury unless evidence is admitted supporting the defense.

(2) If the issue of the existence of a defense is submitted to the jury, the court shall charge that any reasonable doubt on the issue requires that the defendant be acquitted.

(3) A “defense” is any matter:

(A) Designated a defense by a section of the Arkansas Criminal Code;

(B) Designated a defense by a statute not a part of the Arkansas Criminal Code; or

(C) Involving an excuse or justification peculiarly within the knowledge of the defendant on which he or she can fairly be required to introduce supporting evidence.

(d)(1) The defendant shall prove an affirmative defense by a preponderance of the evidence.

(2) An “affirmative defense” is any matter designated an affirmative defense by a:

(A) Section of the Arkansas Criminal Code; or

(B) Statute not a part of the Arkansas Criminal Code.

(e) When the Arkansas Criminal Code or a statute not a part of the Arkansas Criminal Code provides that proof of a particular fact gives rise to a presumption as to the existence of a fact that is an element of the offense, the provision has the following consequences:

(1) If there is evidence of the fact giving rise to the presumption, the issue as to the existence of the presumed fact shall be submitted to the jury unless the court determines that the evidence as a whole precludes a finding beyond a reasonable doubt of the presumed fact; and

(2)(A) If the issue as to the existence of the presumed fact is submitted to the jury, the court shall charge that evidence of the fact

giving rise to the presumption is for the jury's consideration under all the circumstances of the case and to be weighed in determining the issue.

(B) However, the evidence of the fact giving rise to the presumption alone does not impose a duty of finding the presumed fact, even if the evidence is un rebutted.

History. Acts 1975, No. 280, § 110; A.S.A. 1947, § 41-110.

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

CASE NOTES

ANALYSIS

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Constitutionality. *

Requiring a criminal defendant to prove his affirmative defense by a preponderance of the evidence does not violate the due process clause of the United States Constitution. *Hobgood v. State*, 262 Ark. 725, 562 S.W.2d 41, cert. denied, 439 U.S. 963, 99 S. Ct. 449, 58 L. Ed. 2d 421 (1978).

Construction.

The application of § 5-1-103(d) is governed by subsection (c) of this section. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

The requirement of proof of jurisdiction under subsection (a) is tempered by subsection (b). *Dewitt v. State*, 306 Ark. 559, 815 S.W.2d 942 (1991).

In defendant's insurance fraud case, the state's appeal of the trial court's instruction on entrapment by estoppel was dismissed where the state was not asking for an interpretation of the law, but rather a ruling on the application of the law to the facts of the particular case; because the

state's argument merely raised the issue of application and not the interpretation of a statutory provision, the appeal did not involve the correct and uniform administration of the criminal law. *State v. Hagan-Sherwin*, 356 Ark. 597, 158 S.W.3d 156 (2004).

Burden of Proof.

To prevail on an insanity defense, a defendant has to prove, by a preponderance of the evidence, that at the time of the events in question, "as a result of mental disease or defect," he lacked the capacity to "conform his conduct to the requirements of law or to appreciate the criminality of his conduct" under § 5-2-312(a) and subsection (d) of this section. *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Capital Cases.

The burden of proof is not higher in death cases than the standard of beyond a reasonable doubt. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Defenses.

Defendant had burden to prove circumstances which would excuse or justify the killing. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937); *Burgy v. State*, 256 Ark. 677, 509 S.W.2d 820 (1974) (preceding decisions under prior law).

It was error for the court to instruct the jury that to justify the killing the burden was on defendant to prove self-defense or any element of self-defense by a preponderance of the evidence. *Mode v. State*, 231 Ark. 477, 330 S.W.2d 88 (1959), cert. denied, 370 U.S. 909, 82 S. Ct. 1254, 8 L. Ed. 2d 403 (1962) (decision under prior law).

Evidence sufficient to warrant instructing the jury on the burden of proving circumstances of mitigation. *Bosnick v. State*, 248 Ark. 1289, 455 S.W.2d 688 (1970) (decision under prior law).

Entrapment must be proved by the defendant by a preponderance of the evidence. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Rhoades v. State*, 270 Ark. 962, 607 S.W.2d 76 (Ct. App. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3048, 69 L. Ed. 2d 417 (1981); *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362 (1983); *Hill v. State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985); *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985).

Where the evidence was in conflict on the question of an affirmative defense, it presented a question of fact for the trial court as to whether defendant had carried his burden of proof, and since the defense had not been established as a matter of law, deferment must be given to the trial court. *Leeper v. State*, 264 Ark. 298, 571 S.W.2d 580 (1978).

The question of preponderance is primarily one for the jury, and a judge may direct a verdict only when no fact issue exists. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Defense of mental disease or defect is an affirmative defense which defendant must prove by a preponderance of the evidence. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

The disposition of one found mentally unfit to proceed with a trial because of mental disease or defect cannot possibly be considered a defense under the Code. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Justification is not an affirmative defense; it becomes a defense when any evidence is offered tending to support its existence and such evidence may be intro-

duced by either side. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979).

Subsection (c)(3) does not require the trial court, sua sponte, to give an instruction on an ordinary defense. *Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980).

The burden on the defendant to prove an affirmative defense by preponderance of the evidence does not arise until after the state has proved every element of the offense beyond a reasonable doubt. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

Entrapment is not required to be found as a matter of law when the testimony of the accused, showing entrapment, is not rebutted by evidence presented by the state. *McCaslin v. State*, 298 Ark. 335, 767 S.W.2d 306 (1989).

Neither subsection (d) of this section nor § 5-2-607(a) defines justification or self defense as an affirmative defense. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

There is no requirement in the criminal law requiring the pleading of affirmative defenses. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

The trial court was incorrect in ruling that the defense should not refer to the word entrapment during the trial because entrapment had not been pled, in light of the fact that the state acknowledged it had been put on notice that the defense would be raised. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Evidence.

Circumstantial evidence can constitute substantial evidence. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993).

Instructions.

Instruction in language of former similar provision that the burden of the whole case is on the state and that when evidence is introduced either on the part of the state or the defendant which tends to justify or excuse the act of the defendant and which, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant the jury must acquit was proper. *Thomas v. State*, 85 Ark. 357, 108 S.W. 224 (1908) (decision under prior law).

While it was error where there was a

conflict as to who committed the offense, to instruct in the language of this section, the error was not prejudicial as assuming that the offense was committed by the accused if no such construction was placed upon it by the court or counsel and the question as to who committed the offense was otherwise submitted to the jury. *Easter v. State*, 96 Ark. 629, 132 S.W. 924 (1910) (decision under prior law).

Instruction that burden of proving justification or excuse devolved upon the defendant unless the state's evidence showed that an offense of a lesser degree involving excuse was committed or that the accused was justified or excused in committing the offense, held proper. *Turner v. State*, 128 Ark. 565, 195 S.W. 5 (1917); *Crews v. State*, 179 Ark. 94, 14 S.W.2d 261 (1929); *Hogue v. State*, 194 Ark. 1089, 110 S.W.2d 11 (1937); *Covey v. State*, 232 Ark. 79, 334 S.W.2d 648 (1960) (preceding decisions under prior law).

Instruction in the language of former similar section, while abstract, held not prejudicial. *Wilson v. State*, 126 Ark. 354, 190 S.W. 441 (1916) (decision under prior law).

The giving of former section concerning burden of proving mitigation as an instruction was proper against contentions that instruction assumed the offense to have been proved and that there was no issue of justification or excuse. *Trammell v. State*, 193 Ark. 21, 97 S.W.2d 902 (1936) (decision under prior law).

Where there was evidence introduced by the state, which would support a conviction, it was not error for the court to instruct the jury, that the offense being proved, the burden was upon the defendant to prove mitigating circumstances to justify or excuse the homicide. *Newboles v. State*, 214 Ark. 240, 215 S.W.2d 285 (1948) (decision under prior law).

In a criminal case an instruction on burden of proof given in the words of former statute concerning burden of proving mitigation was sufficient. *McGarrah v. State*, 217 Ark. 186, 229 S.W.2d 665 (1950) (decision under prior law).

Instruction of court in conformity with the language of former section concerning circumstance of proving mitigation and as to presumption of defendant's innocence was proper. *Hardin v. State*, 225 Ark. 602, 284 S.W.2d 111 (1955) (decision under prior law).

It was not error for the court in a criminal case to instruct the jury in the language of former section concerning burden of proving mitigation, where the jury was also instructed to the effect that defendant was presumed innocent until found beyond a reasonable doubt to be guilty. *Brown v. State*, 231 Ark. 363, 329 S.W.2d 521 (1959) (decision under prior law).

Instruction in the language of former section concerning burden of proving circumstances of mitigation held not justified. *Bosnick v. State*, 248 Ark. 1289, 455 S.W.2d 311 (1970) (decision under prior law).

Instruction that, if the jury had a reasonable doubt as to the degree of the offense, it must give the benefit of that doubt to the defendant, and it should convict the defendant of a lesser degree of the offense, did not mislead the jury as to the burden of proof. *Leonard v. State*, 251 Ark. 1090, 476 S.W.2d 807 (1972) (decision under prior law).

Regardless of the trial court's mistake in describing justification or self defense as an affirmative defense, there was no reversible error because no objection was made to the instruction. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

Jurisdiction.

Before the state is called upon to offer any evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979); *Richards v. State*, 279 Ark. 219, 650 S.W.2d 566 (1983); *Graham v. State*, 34 Ark. App. 126, 806 S.W.2d 32 (1991); *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995).

While jurisdiction must be proven beyond a reasonable doubt at the trial level, on appeal the test is only whether there is substantial evidence to support a jury verdict. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

It is not essential to a prosecution in this state that all the elements of the crime charged take place in Arkansas; rather if the requisite elements of the

crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979); *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985).

Evidence held sufficient to support the jury's finding that the offense had occurred in Arkansas. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

The state is presumed to have jurisdiction. *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985).

Where there was evidence before the trial court that the offense took place at least in part in Arkansas, even if there had been an affirmative showing by the defendant of lack of jurisdiction, the state's proof was sufficient to overcome it. *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985).

Although the murder instrument was found in a county other than where the crime was prosecuted and a police chief who investigated the crime testified it was his opinion that the victim had been killed in that other county, but he did not state his basis for that opinion, there was no positive evidence from which a juror could say where the crime occurred; therefore, the state did not have the burden to prove that the crime occurred in the county where it was prosecuted. *Dix v. State*, 290 Ark. 28, 715 S.W.2d 879 (1986).

If the requisite elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991).

It is not essential to a prosecution in Arkansas that all elements of the crime charged take place in Arkansas; jurisdiction can lie in this state if at least one element of the charged offense occurred in Arkansas. *Graham v. State*, 34 Ark. App. 126, 806 S.W.2d 32 (1991).

There was no reasonable basis to question the trial court's exercise of jurisdiction in defendant's trial for murder, where eyewitness testimony affirmatively proved where the murder occurred. *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991).

Defendant's territorial jurisdictional claim was dismissed where he presented no positive evidence that the offense occurred anywhere other than in the county of the circuit court in which it was filed. *Cates v. State*, 329 Ark. 585, 952 S.W.2d 135 (1997).

Where the state presented substantial evidence that one or more elements of appellant's felony murder offense—murder while kidnapping or attempting to kidnap his victim—occurred in Miller County, territorial jurisdiction was proper there pursuant to subsection (b) of this section. *Ridling v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 58 (Jan. 27, 2005).

Jurisdiction in Arkansas was proper for defendant's theft trial because sufficient circumstantial evidence existed to show that defendant took unauthorized control of a vehicle in West Memphis. *King v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 231 (Apr. 14, 2005).

Presumption.

The unexplained possession or control by a person of recently stolen property, or the acquisition by a person of property for a consideration known to be far below its reasonable value, gives rise to a presumption that he or she knows or believes that the property was stolen. *Jones v. State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987).

Reasonable Doubt.

The burden of the case as a whole was on the state. *Cogburn v. State*, 76 Ark. 110, 88 S.W. 822 (1905); *Tignor v. State*, 76 Ark. 489, 89 S.W. 96 (1905); *Petty v. State*, 76 Ark. 515, 89 S.W. 465 (1905) (preceding decisions under prior law).

It was not necessary that each link in the chain of evidence be established beyond doubt; it was sufficient if all together satisfy the jury beyond a reasonable doubt of defendant's guilt. *Carr v. State*, 81 Ark. 589, 99 S.W. 831 (1907) (decision under prior law).

One was entitled to the benefit of a reasonable doubt not only as to his guilt, but as to the degree of the offense. *Childs v. State*, 98 Ark. 430, 136 S.W. 285 (1911); *Walker v. State*, 100 Ark. 180, 139 S.W. 1139 (1911); *Scoggin v. State*, 109 Ark. 510, 159 S.W. 211 (1913); *Carlton v. State*, 109 Ark. 516, 161 S.W. 145 (1913); *Edwards v. State*, 110 Ark. 590, 163 S.W. 155

(1914); *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937) (preceding decisions under prior law).

Notwithstanding former section concerning burden of proving mitigation, the burden was still on the state to prove the accused's guilt of any degree of crime included in the indictment. *Reynolds v. State*, 186 Ark. 223, 53 S.W.2d 224 (1932) (decision under prior law).

Venue.

Defendant's contention that the state failed to establish venue held to be without merit. *Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624, cert. denied, 457 U.S. 1136, 102 S. Ct. 2966, 73 L. Ed. 2d 1355 (1982).

State was not required to put on proof that the offense charged was committed in the county and venue was presumed proper unless there was affirmative evidence to the contrary. *Baggett v. State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985).

The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue unless the defendant produces evidence to dispute the

propriety of the venue of the trial. *Higgins v. State*, 317 Ark. 555, 879 S.W.2d 424 (1994).

Cited: *Long v. State*, 260 Ark. 417, 542 S.W.2d 742 (1976); *Langley v. State*, 261 Ark. 539, 549 S.W.2d 799 (1977); *Akins v. State*, 264 Ark. 376, 572 S.W.2d 140 (1978); *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979); *Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979); *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979); *Hobgood v. Housewright*, 698 F.2d 962 (8th Cir. 1983); *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983); *Holt v. State*, 281 Ark. 210, 662 S.W.2d 822 (1984); *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984); *Johnson v. State*, 298 Ark. 617, 770 S.W.2d 128 (1989); *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989); *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993); *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996); *Renfro v. State*, 331 Ark. 253, 962 S.W.2d 745 (1998); *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000); *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001).

5-1-112. Affirmative defense — Former prosecution for same offense.

A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:

(1)(A) The former prosecution resulted in an acquittal.

(B)(i) There is an acquittal if the former prosecution resulted in a determination of not guilty.

(ii) A determination of guilt of a lesser included offense is an acquittal of the greater inclusive offense although the conviction is subsequently set aside;

(2)(A) The former prosecution resulted in a conviction.

(B) There is a conviction if the former prosecution resulted in a:

(i) Judgment of conviction that has not been reversed or vacated;

(ii) Verdict of guilty that has not been set aside and that is capable of supporting a judgment; or

(iii) Plea of guilty or *nolo contendere* accepted by the court; or

(3) The former prosecution was terminated without the express or implied consent of the defendant after the jury was sworn or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.

History. Acts 1975, No. 280, § 106; A.S.A. 1947, § 41-106.

Cross References. Double jeopardy prohibition, Ark. Const., Art. 2, § 8.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

UALR L.J. Derden, Survey of Arkansas Law: Criminal Procedure, 2 UALR L.J. 203.

CASE NOTES

ANALYSIS

Acquittal.
 Appeals.
 Attachment of jeopardy.
 Burden of proof.
 Common-law defenses.
 Consent of defendant to termination.
 Construction with other law.
 Continuance.
 Conviction.
 Guilty pleas.
 Mistrial.
 Overruling necessity.
 Remand.
 Separate offenses.

Acquittal.

A trial ending in a hung jury is not the equivalent of acquittal for purposes of establishing a former jeopardy or collateral estoppel to bar retrial. *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

While a directed verdict dismissing a charge alleged against defendant in an information acquitted him of that charge, the prosecutor was allowed to amend the information to charge a lesser-included offense, and defendant's prosecution for and conviction of that offense, in the same proceeding in which the greater charge had been alleged, did not offend double jeopardy or subsection (1) of this section. *Hughes v. State*, 347 Ark. 696, 66 S.W.3d 645 (2002).

Appeals.

If the district court finds a defendant has failed to make a colorable showing of previous jeopardy and the threat of repeated jeopardy, the filing of a notice of appeal from the denial of the double jeopardy motion does not divest the district court of jurisdiction. *United States v. Brown*, 926 F.2d 779 (8th Cir. 1991).

Attachment of Jeopardy.

Since a jury was never sworn to hear defendant's case, double jeopardy did not attach and the trial court did not err in denying the motion to dismiss the charge

on such grounds. *Smith v. State*, 307 Ark. 542, 821 S.W.2d 774 (1992).

In both bench and jury trials, jeopardy attaches when the trial judge or jury hears the first witness and not until then. *Tipton v. State*, 331 Ark. 28, 959 S.W.2d 39 (1998).

Burden of Proof.

Since a plea of former acquittal or conviction is an affirmative defense, the burden is on the accused to sustain the plea. The accused must prove not only the former jeopardy conviction, or acquittal, but also the identity of the offenses and the jurisdiction of the court in the former trial. *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

The burden is on the state to demonstrate that the state will not rely on conduct for which the defendant has already been convicted in proving the pending charge. *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991).

Common-Law Defenses.

The law-of-the-case defense is an affirmative defense like estoppel or res judicata. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Consent of Defendant to Termination.

A defendant's consent to the termination of a trial can be either express or implied; if the defendant's consent is evident, demonstration of an overruling necessity is not required in order to avoid the affirmative defense of double jeopardy. *Phillips v. State*, 338 Ark. 209, 992 S.W.2d 86 (1999).

Construction with Other Law.

Entry of the judgment and commitment order is what determines the effectiveness of a guilty plea; thus, to the extent subdivision (2) of this section conflicts with Ark. Sup. Ct. Admin. Order No. 2, it is superseded by that order and Arkansas caselaw. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Continuance.

A continuance is not a termination, and this section would not be applicable where the proceedings were merely continued and then resumed, not terminated and then begun anew. *Daniels v. State*, 12 Ark. App. 251, 674 S.W.2d 949 (1984).

Where a continuance was requested for the benefit of the defense and was granted without objection, the necessary consent to termination of the prosecution under subdivision (3) will be implied. *Woods v. State*, 287 Ark. 212, 697 S.W.2d 890 (1985).

Conviction.

Prosecution in circuit court, of defendant convicted by a municipal court jury of misdemeanor and felony drug offenses, barred by double jeopardy. *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993).

Guilty Pleas.

Defendant's accepted guilty plea, along with the resulting sentence, was never memorialized as a judgment and commitment order and, thus, was never an effective judgment of conviction. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Mistrial.

Where defendant had ample opportunity to apprise judge that defendant was not seeking or agreeing to a mistrial, no violation of subdivision (3) of this section occurred. *Rowlins v. State*, 319 Ark. 323, 891 S.W.2d 56 (1995).

Where the defendant successfully moved to reconvene his trial after the court excused a juror who was related to a witness, he could not later complain that the subsequent trial was barred by double jeopardy. *Schalk v. State*, 63 Ark. App. 251, 977 S.W.2d 495 (1998).

Overruling Necessity.

Either a deadlocked jury or the illness of a juror is a circumstance which qualifies as "overruling necessity." *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

Where the prosecutor had become ill and could not continue with the prosecution of defendant's trial and the trial court proceeded by accepting a deputy prosecutor, but subsequently, a conflict with one of the jurors was revealed, it was manifestly necessary for the court to order a mistrial, a second trial was not barred by double jeopardy. *Green v. State*, 52 Ark. App. 244, 917 S.W.2d 171 (1996).

Remand.

Where the error in prematurely dismissing the charge occurred before jeopardy attached, as there never was a determination that the state failed to prove the elements of the crime, the case was remanded rather than dismissed. *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991).

Separate Offenses.

Defendant's convictions for incest in one county did not prevent his prosecution for incest in another county where the second prosecution was not for the same offense committed in the first county and where the offenses in the second county were not based on the same conduct for which he was convicted in the first county. *Fletcher v. State*, 53 Ark. App. 135, 920 S.W.2d 42 (1996).

Cited: *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980); *Willis v. State*, 299 Ark. 356, 772 S.W.2d 584 (1989); *Leach v. State*, 313 Ark. 80, 852 S.W.2d 116 (1993); *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994); *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996).

5-1-113. Affirmative defense — Former prosecution for different offense.

A former prosecution is an affirmative defense to a subsequent prosecution for a different offense under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as set out in § 5-1-112, and the subsequent prosecution is for:

(A) Any offense of which the defendant could have been convicted in the first prosecution; or

(B) An offense based on the same conduct, unless:

(i) The offense of which the defendant was formerly convicted or acquitted and the offense for which he or she is subsequently prosecuted each requires proof of a fact not required by the other offense and the law defining each offense is intended to prevent a substantially different harm or evil; or

(ii) The second offense was not consummated when the former trial began;

(2) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction of the second offense; or

(3) The former prosecution was terminated under the circumstances described in § 5-1-112 and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been terminated.

History. Acts 1975, No. 280, § 107; A.S.A. 1947, § 41-107.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

UALR L.J. Survey — Criminal Procedure, 11 UALR L.J. 187.

CASE NOTES

ANALYSIS

Conspiracy.
Conviction.
Different degrees.
Issue preclusion.
Offense not yet consummated.
Separate offenses.

Conspiracy.

While in a sense both the offenses of possession of methamphetamine with intent to deliver and conspiracy to distribute methamphetamine may be based on the same conduct, the offense of possession with intent to deliver and the offense of conspiracy to distribute each requires proof of a fact not required by the other; therefore, the affirmative defense of this section does not apply. *Williams v. State*, 54 Ark. App. 271, 927 S.W.2d 812 (1996), rev'd on other grounds, 328 Ark. 487, 944 S.W.2d 822 (1997).

Conviction.

Double jeopardy does not attach where there is no possibility of conviction; there-

fore, a defendant was not entitled to have the charges dismissed on double jeopardy grounds merely because the victim had testified against the same defendant in a separate prosecution involving a different victim. *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982).

Different Degrees.

State was not prevented by collateral estoppel from subsequently retrying defendant for a lesser degree of the original offense charged where the first trial did not result in an acquittal and, although the charge at the first trial included a charge on the offense charged in the second trial, there was not a necessary determination of the defendant's guilt of the second offense in the finding of his guilt of the original charge. *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980).

Issue Preclusion.

As a consequence of defendant's acquittal of the possession of a firearm charge in the first case, the issue preclusion facet of *res judicata* and subdivision (2) of this

section precluded the state from presenting evidence that defendant possessed a firearm during the battery crimes at the second trial. *Mason v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 235 (Apr. 14, 2005).

Offense Not Yet Consummated.

Where one victim was not dead at the time of the manslaughter conviction stemming from the death of another victim in the same incident, the subsequent prosecution was not barred; this “not yet consummated” exception to a defendant’s right not to be tried twice for the same offense does not violate the principle of former jeopardy. *Tackett v. State*, 294 Ark. 609, 745 S.W.2d 625 (1988).

Separate Offenses.

Where offenses are separate, a defen-

dant who had been convicted of one offense was not twice placed in jeopardy by being convicted of another offense. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977).

Defendant’s convictions for incest in one county did not prevent his prosecution for incest in another county where the second prosecution was not for the same offense committed in first county and where the offenses in the second county were not based on the same conduct for which he was convicted in the first county. *Fletcher v. State*, 53 Ark. App. 135, 920 S.W.2d 42 (1996).

Cited: *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994); *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996).

5-1-114. Affirmative defense — Former prosecution in another jurisdiction.

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or territory of the United States, a prosecution in any such other jurisdiction is an affirmative defense to a subsequent prosecution in this state under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as set out in § 5-1-112, and the subsequent prosecution is based on the same conduct unless:

(A) The offense of which the defendant was formerly convicted or acquitted and the offense for which he or she is subsequently prosecuted each requires proof of a fact not required by the other offense and the law defining each offense is intended to prevent a substantially different harm or evil; or

(B) The second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and that required a determination inconsistent with a fact that must be established for the conviction of the offense for which the defendant is subsequently prosecuted.

History. Acts 1975, No. 280, § 108; A.S.A. 1947, § 41-108.

RESEARCH REFERENCES

ALR. Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — Modern view. 97 ALR 5th 201.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

CASE NOTES

ANALYSIS

Applicability.
Inconsistent determinations.
Prosecution for same conduct.

Applicability.

Where underlying conduct upon which the federal conviction and the Arkansas charge were based was not the same, the former jeopardy protection provided in this section did not apply. *State v. McMullen*, 302 Ark. 252, 789 S.W.2d 715 (1990).

Inconsistent Determinations.

Where state charge requires proof of an element not required for conviction under the federal charge, and not inconsistent with the elements required to be proved to convict on the federal charge, the defendant did not establish a double jeopardy claim under subdivision (2). *Journey v. State*, 261 Ark. 259, 547 S.W.2d 433 (1977).

Prosecution for Same Conduct.

Where a defendant was acquitted on a federal charge and then charged under state law, and where he had failed to establish a double jeopardy claim under § 16-85-712(b), such claim would also fail under subdivision (1) of this section. *Journey v. State*, 261 Ark. 259, 547 S.W.2d 433 (1977).

When the same conduct constitutes an offense within concurrent federal and state jurisdictions, a federal conviction or acquittal is an affirmative defense to a state prosecution. *Bateman v. State*, 265 Ark. 307, 578 S.W.2d 216 (1979).

Identical offenses under state and federal law would not be different merely because the punishments were different. *Bateman v. State*, 265 Ark. 307, 578 S.W.2d 216 (1979).

Cited: *Thompson v. State*, 27 Ark. App. 164, 768 S.W.2d 39 (1989); *State v. Johnson*, 330 Ark. 636, 956 S.W.2d 181 (1997).

5-1-115. Former prosecutions which are not affirmative defenses.

A former prosecution is not an affirmative defense within the meaning of §§ 5-1-112 — 5-1-114 under any of the following circumstances:

(1) The former prosecution was before a court that lacked jurisdiction over the defendant or the offense;

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting official or aggrieved party and with the purpose of avoiding the sentence that might otherwise be imposed; or

(3) The former prosecution resulted in a judgment of conviction that was held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis, or similar process.

History. Acts 1975, No. 280, § 109; A.S.A. 1947, § 41-109.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430. .

CASE NOTES

ANALYSIS

Common-law defenses.
Municipal court conviction.

Common-Law Defenses.

The law-of-the-case defense is an affirmative defense like estoppel or res judicata. State v. Bell, 329 Ark. 422, 948 S.W.2d 557 (1997).

5-1-116. [Repealed.]

Publisher's Notes. This section, concerning the trial of minors, was repealed by Acts 1989, No. 273, § 47. The section was derived from Acts 1975, No. 280,

5-1-117 — 5-1-124. [Reserved.]

5-1-125. [Repealed.]

Publisher's Notes. This section, concerning right of action not being merged in a felony, was repealed by Acts 2005, No. 1994, § 535. The section was derived from

Municipal Court Conviction.

Prosecution in circuit court of defendant convicted by a municipal court jury of misdemeanor and felony drug offenses barred by double jeopardy. Craig v. State, 314 Ark. 585, 863 S.W.2d 825 (1993).

Cited: Muhammad v. State, 67 Ark. App. 262, 998 S.W.2d 763 (1999).

§ 617; 1979, No. 815, § 11; 1981, No. 793, § 1; 1983, No. 904, § 1; A.S.A. 1947, § 41-617.

Rev. Stat., ch. 45, § 264; C. & M. Dig., § 1086; Pope's Dig., §§ 1294, 1297; A.S.A. 1947, § 41-151.

CHAPTER 2
PRINCIPLES OF CRIMINAL LIABILITY

SUBCHAPTER

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. CULPABILITY.
- 3. MENTAL DISEASE OR DEFECT.
- 4. PARTIES TO OFFENSES.
- 5. ORGANIZATIONS AND THEIR AGENTS.
- 6. JUSTIFICATION.

RESEARCH REFERENCES

ALR. Automatism or unconsciousness as defense to criminal charge. 27 ALR 4th 1067.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — CULPABILITY

SECTION.

- 5-2-201. Definitions generally.
 5-2-202. Culpable mental states — Definitions.
 5-2-203. Culpable mental states — Interpretation of statutes.
 5-2-204. Elements of culpability — Exceptions to culpable mental state requirement.

SECTION.

- 5-2-205. Causation.
 5-2-206. Ignorance or mistake.
 5-2-207. Intoxication.
 5-2-208. Duress.
 5-2-209. Entrapment.

Effective Dates. Acts 1977, No. 101, § 3: Feb. 4, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the defense of voluntary intoxication is detrimental to the welfare and safety of the citizens of this State in that criminals are at times excused from the consequences of their criminal acts merely because of their voluntary intoxication and that this Act is

necessary to eliminate the defense of self-induced or voluntary intoxication. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in effect from the date of its passage and approval."

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

RESEARCH REFERENCES

ALR. Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 ALR 4th 481.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged. 5 ALR 4th 1128.

Test of criminal responsibility: state cases. 9 ALR 4th 526.

Defense in sex offense prosecutions, generally. 12 ALR 4th 413.

Entrapment to commit traffic offense. 34 ALR 4th 1167.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 126 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

C.J.S. 22 C.J.S. Crim. L., § 31 et seq.

5-2-201. Definitions generally.

As used in the Arkansas Criminal Code:

(1) "Act" means a bodily movement and includes speech and the conscious possession or control of property;

(2) "Act" as a verb means either to perform an act or to omit to perform an act;

(3) "Conduct" means an act or omission and its accompanying mental state; and

(4) "Omission" means a failure to perform an act and the performance of the act is required by law.

History. Acts 1975, No. 280, § 201; A.S.A. 1947, § 41-201.

Meaning of “Arkansas Criminal Code”. See note to § 5-1-101.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

CASE NOTES

Cited: Hamilton v. State, 262 Ark. 366, 556 S.W.2d 884 (1977); Robinson v. State, 318 Ark. 33, 883 S.W.2d 469 (1994).

5-2-202. Culpable mental states — Definitions.

As used in the Arkansas Criminal Code, there are four (4) kinds of culpable mental states that are defined as follows:

(1) “**PURPOSELY.**” A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person’s conscious object to engage in conduct of that nature or to cause the result;

(2) “**KNOWINGLY.**” A person acts knowingly with respect to:

(A) The person’s conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist; or

(B) A result of the person’s conduct when he or she is aware that it is practically certain that his or her conduct will cause the result;

(3) “**RECKLESSLY.**”

(A) A person acts recklessly with respect to attendant circumstances or a result of his or her conduct when the person consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of a nature and degree that disregard of the risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation; and

(4) “**NEGLIGENTLY.**”

(A) A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of such a nature and degree that the actor’s failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation considering the nature and purpose of the actor’s conduct and the circumstances known to the actor.

History. Acts 1975, No. 280, § 203; A.S.A. 1947, § 41-203.

Meaning of “Arkansas Criminal Code”. See note § 5-1-101.

RESEARCH REFERENCES

Ark. L. Notes. Liebman, Voluntary Intoxication as a Defense to Crime, 1983 Ark. L. Notes 29.

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

UALR L.J. Survey of Arkansas Law, Criminal Law, 5 UALR L.J. 115.

Notes, Criminal Law — Child Abuse Resulting in Death — Arkansas Amends its First Degree Murder Statute, 10 UALR L.J. 785.

CASE NOTES

ANALYSIS

Evidence.
Knowingly.
Negligently.
Purposely.
Recklessly.
Recklessly and negligently distinguished.

Evidence.

Intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances. Walker v. State, 313 Ark. 478, 855 S.W.2d 932 (1993).

Intent is seldom capable of proof by direct evidence. Akbar v. State, 315 Ark. 627, 869 S.W.2d 706 (1994).

Where there was a plan between defendant and the accomplice to kill a drug dealer during the drug transaction, defendant admitted to driving the truck to a remote location, there was also some evidence that defendant was in a scheme to murder the victim for a fee, defendant lied about the victim's whereabouts, and defendant fled from the scene, there was ample evidence to rationally support the giving of an instruction on the lesser-included offense of first-degree murder. Grillot v. State, 353 Ark. 294, 107 S.W.3d 136 (2003).

In a murder trial, where defendant asserted that the victim was killed as they struggled over a rifle, the jury could have considered the fact that defendant burned not only the victim's body, but all of her personal belongings, in an attempt to cover up his involvement in the crime; such proof was further evidence of a purposeful state of mind. Robinson v. State, 353 Ark. 372, 108 S.W.3d 622 (2003).

Jury could have inferred from defendant's words and his violent manner of entry that he intended to cause bodily harm to his ex-wife; defendant knocked on the front door with a concrete block and

shouted to his ex-wife that she was "fixing to get it," and members of the jury were allowed to draw upon their common knowledge and experience to infer a defendant's intent from the circumstances. Crowder-Jones v. State, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

Knowingly.

Evidence was sufficient to support a verdict that defendant acted "knowingly." Harris v. State, 262 Ark. 680, 561 S.W.2d 69 (1978), aff'd, 265 Ark. 517, 580 S.W.2d 453 (1979); Smith v. State, 30 Ark. App. 111, 783 S.W.2d 72 (1990).

There was ample circumstantial evidence for the jury to find that defendant knowingly caused the death of the infant. Steggall v. State, 340 Ark. 184, 8 S.W.3d 538 (2000).

The court looked at the totality of the circumstances surrounding the interrogation and determined that the state proved that the defendant had the requisite level of comprehension to knowingly waive his rights. Steggall v. State, 340 Ark. 184, 8 S.W.3d 538 (2000).

Sufficient evidence existed for the jury to find that defendant, the victim's caretaker, knowingly committed second-degree murder when she used enough force inserting a rectal thermometer that she punctured the child's rectum, causing peritonitis, and then failed to immediately seek medical attention. Burley v. State, 348 Ark. 422, 73 S.W.3d 600 (2002).

Negligently.

In order to be held to have acted negligently under this section, it is not necessary that the actor be fully aware of a perceived risk and recklessly disregard it, rather, it requires only a finding that, under the circumstances, he should have been aware of it and his failure to perceive it was a "gross deviation" from the care a

reasonably prudent person would exercise under those circumstances; the section itself declares that the degree of negligence sufficient to establish civil liability will not suffice for the purpose of this section. *Phillips v. State*, 6 Ark. App. 380, 644 S.W.2d 288 (1982).

There was substantial evidence from which to find that the defendant acted negligently. *Phillips v. State*, 6 Ark. App. 380, 644 S.W.2d 288 (1982).

Negligent conduct is distinguished from reckless conduct primarily in that it does not involve the conscious disregard of a perceived risk; in order to be held to have acted negligently, it is not necessary that the actor be fully aware of a perceived risk and recklessly disregard it, rather, it requires only a finding that under the circumstances he should have been aware of the risk and his failure to perceive it was a gross deviation from the care a reasonable, prudent person would exercise under those circumstances. *Hunter v. State*, 341 Ark. 665, 19 S.W.3d 607 (2000).

Purposely.

The kind of evidence and quantum of proof required to show a "conscious object" so as to make an action purposeful under subdivision (1) of this section is the same as that which was formerly required to show "specific intent," and may be inferred from the facts and circumstances shown in evidence. *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979).

Where offense requires a purposeful mental state, the defense of voluntary intoxication is available to a defendant charged with such crime. *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

Evidence was sufficient to support a finding that defendant acted purposely. *Black v. State*, 306 Ark. 394, 814 S.W.2d 905 (1991); *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996); *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

The jury could reasonably have inferred that defendant purposely killed his victim, based on the type of weapon used, the manner of its use, and the location of the wounds. *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991).

Purposeful intent of the defendant can be inferred from the manner of the victim's death and the location of the victim's wound. *Walker v. State*, 313 Ark. 478, 855 S.W.2d 932 (1993).

Premeditation, deliberation, and purposeful intent can be formed on the spur of the moment. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

There was substantial evidence that defendant acted with the purpose to cause serious physical injury to the victim under circumstances manifesting extreme indifference to the value of human life where he kicked the victim in the head repeatedly after the victim was down. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

Where the evidence presented showed that defendant had a stormy relationship with the victim, that they argued the night before a fatal shooting, that defendant had pointed a gun at the victim in the past, that defendant had retrieved a gun on the morning of the shooting, and that defendant admitting to shooting the victim, there was sufficient evidence to sustain a conviction for first-degree murder; the evidence was sufficient to show defendant acted purposely, rather than accidentally. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003).

Based on the testimony of several eyewitnesses that defendant had shot a victim near a vehicle after an argument, there was sufficient evidence presented to infer that defendant acted with a conscious desire to kill the victim. *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003).

A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

Appellate court found no merit in defendant's argument that he was merely rhetorically questioning a 14-year-old girl about sex, rather than soliciting her, and that he had no intent to make such a statement where there was testimony that he offered to pay money in exchange for sex, that he offered her more money after she refused him, and that he kissed her on the neck after encouraging the young boys in her charge to kiss her. *Heape v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 631 (Sept. 22, 2004).

Evidence was sufficient for a conviction of first-degree murder where the victim was last seen in the company of defendant, defendant made statements to his

fellow inmates that he killed the victim with his hands in a fight after an argument, defendant told his brother that he would like to kill the victim, the victim's body was placed on wood burning stove, defendant kicked the pipe off of the stove, and the victim's body was found charred. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

Recklessly.

The definition of "recklessly" is of such common understanding and practice that its meaning in certain statutes as an element of an offense is not unconstitutionally vague. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

The word recklessly is not an obscure, vague or technical word outside the scope of the common understanding of the ordinary individual or juror; therefore, even though there is a statutory definition, such definition is not essential for the jury's understanding of a charge involving reckless conduct. *Viar v. State*, 269 Ark. 772, 601 S.W.2d 579 (Ct. App. 1980).

Failure to instruct on the meaning of the word "recklessly" was held proper. *Viar v. State*, 269 Ark. 772, 601 S.W.2d 579 (Ct. App. 1980).

It was error for the trial court to refuse defendant's requested instruction on offense involving negligence since the jury would have determined under this section whether the defendant should have been aware of the risk involved in her actions. *Worring v. State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981).

There was substantial evidence to support conclusion that defendant acted recklessly. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981); *Smith v. State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981).

Defendant recklessly caused the death of her baby by consciously disregarding a substantial and unjustifiable risk that death might occur if she did not feed the baby more often. *Miles v. State*, 59 Ark. App. 97, 954 S.W.2d 286 (1997).

There was sufficient evidence of reckless conduct to support the conviction for second-degree assault where defendant pushed victim from behind as she went through a door; defendant's actions created a substantial risk that the victim would be physically injured by falling on a concrete sidewalk, and it was of no consequence that victim was able to regain her

balance before falling. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997).

Evidence that defendant had been stared at by the victim did not provide a rational basis for giving a reckless manslaughter jury instruction. *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001).

Second-degree murder conviction was affirmed because defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter under § 5-10-104(a)(3); defendant's act of shooting into an ex-spouse's occupied vehicle did not constitute recklessness. *Bankston v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 161 (Mar. 10, 2005).

Recklessly and Negligently Distinguished.

Reckless and negligent conduct, as defined in this section, are distinguished in that reckless conduct involves a conscious disregard of a perceived risk; a person charged with negligent homicide is assumed to have been unaware of the existence of the risk. *Smith v. State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981).

Cited: *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977); *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Rust v. State*, 263 Ark. 350, 565 S.W.2d 19 (1978); *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978); *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978); *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979); *Kirkendall v. State*, 265 Ark. 853, 581 S.W.2d 341 (1979); *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (Ct. App. 1979); *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980); *Darville v. State*, 271 Ark. 580, 609 S.W.2d 50 (1980); *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980); *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Blaney v. State*, 280 Ark. 253, 657 S.W.2d 531 (1983); *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984); *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984); *Heard v. State*, 284 Ark. 457, 683 S.W.2d 232 (1985); *Neely v. State*, 18 Ark. App. 122, 711 S.W.2d 482 (1986); *Jackson v. State*, 290 Ark. 160, 717 S.W.2d 801 (1986); *Fladung v. State*, 292 Ark. 510, 730 S.W.2d 901 (1987); *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1988); *Johnson v. State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989); *Dunlap v. State*, 303

Ark. 222, 795 S.W.2d 920 (1990); Norton v. State, 307 Ark. 336, 820 S.W.2d 272 (1991); Cole v. State, 33 Ark. App. 98, 802 S.W.2d 472 (1991); Cotnam v. State, 36 Ark. App. 109, 819 S.W.2d 291 (1991); Enoch v. State, 37 Ark. App. 103, 826 S.W.2d 291 (1992); Edwards v. State, 40 Ark. App. 114, 842 S.W.2d 459 (1992); Anderson v. State, 312 Ark. 606, 852 S.W.2d 309 (1993); Paige v. State, 45 Ark. App. 13, 870 S.W.2d 771 (1994); Williams v. State, 321 Ark. 635, 906 S.W.2d 677 (1995); Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996); Walker v. State, 324 Ark. 106, 918 S.W.2d 172 (1996); Davis v. State, 325 Ark. 96, 925 S.W.2d 768 (1996); Williams v.

State, 325 Ark. 432, 930 S.W.2d 297 (1996); Webb v. State, 328 Ark. 12, 941 S.W.2d 417 (1997); Ladwig v. State, 328 Ark. 241, 943 S.W.2d 571 (1997); Cox-Hilstrom v. State, 58 Ark. App. 109, 948 S.W.2d 409 (1997); McGill v. State, 60 Ark. App. 246, 962 S.W.2d 382 (1998); Anderson v. State, 62 Ark. App. 1, 967 S.W.2d 569 (1998); Byrd v. State, 337 Ark. 413, 992 S.W.2d 759 (1999), overruled in part on other grounds, McCoy v. State, 347 Ark. 913, 69 S.W.3d 430 (2002); Terrell v. State, 342 Ark. 208, 27 S.W.3d 423 (2000); Kelley v. State, 75 Ark. App. 144, 55 S.W.3d 309 (2001); McEntire v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 599 (Oct. 13, 2005).

5-2-203. Culpable mental states — Interpretation of statutes.

(a) If a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all of the elements of the offense, the prescribed culpable mental state applies to each element of the offense.

(b) Except as provided in §§ 5-2-204(b) and (c), if the statute defining an offense does not prescribe a culpable mental state a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly.

(c)(1) When a statute defining an offense provides that acting negligently suffices to establish an element of that offense, the element also is established if a person acts purposely, knowingly, or recklessly.

(2) When acting recklessly suffices to establish an element, the element also is established if a person acts purposely or knowingly.

(3) When acting knowingly suffices to establish an element, the element also is established if a person acts purposely.

(d) Knowledge that conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

History. Acts 1975, No. 280, § 204; A.S.A. 1947, § 41-204.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

The Culpability, or Mens Rea, "Defense" in Arkansas, 53 Ark. L. Rev. 805 (2000).

UALR L.J. Notes, Criminal Law — Controlled Substances — Arkansas Adopts the Useable Amount Standard. Harbison v. State, 302 Ark. 315, 790 S.W.2d 146 (1990), 13 UALR L.J. 583.

CASE NOTES

ANALYSIS

Establishment.
 Possession of weapons.
 Requirement and establishment.
 Use of weapons.

Establishment.

Criminal purpose or intent is a state of mind that is not ordinarily susceptible to proof by direct evidence; it may be inferred from facts and circumstances shown to have existed at the time. *Chadwell v. State*, 37 Ark. App. 9, 822 S.W.2d 402 (1992).

Appellate court found no merit in defendant's argument that he was merely rhetorically questioning a 14-year-old girl about sex, rather than soliciting her, and that he had no intent to make such a statement where there was testimony that he offered to pay money in exchange for sex, that he offered her more money after she refused him, and that he kissed her on the neck after encouraging the young boys in her charge to kiss her. *Heape v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 631 (Sept. 22, 2004).

Possession of Weapons.

Where a deputy found that defendant had an improvised weapon hidden in his sock while incarcerated at the county jail and defendant said he possessed the weapon because he was "tired of the brutality and he had to do what he had to do", there was substantial evidence from which the jury could have found that defendant knowingly possessed the weapon for the infliction of serious physical injury or death, in violation of § 5-73-131. *Owens v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 722 (Oct. 12, 2005).

Requirement and Establishment.

Where a statute does not contain or specify the culpable mental state required for its violation, pursuant to subsection (b)

of this section, the Criminal Code recognizes three distinct culpable mental states under the section to sustain a conviction. *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984).

The Omnibus Driving While Intoxicated Act of 1983 is valid even though it does not require a culpable mental state pursuant to subsection (b) of this section. *Price v. State*, 285 Ark. 148, 685 S.W.2d 506 (1985).

The "Use of Prohibited Weapons" statute, § 5-73-104, does not create a strict liability offense; it requires proof of a culpable mental state. *State v. Setzer*, 302 Ark. 593, 791 S.W.2d 365 (1990).

Where mandatory language contained within § 27-53-101 did not explicitly enunciate any particular mental state, but instead stated that a driver of a vehicle involved in an accident resulting in death or injury to any person shall immediately stop the vehicle at the scene of the accident, this mandatory language was a clear indication that the accident-causing driver's mental state was irrelevant. *Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003).

Use of Weapons.

Section 5-73-104, prohibiting use of certain weapons, does not create a strict liability offense; under subsection (b) of this section, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

Cited: *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977); *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985); *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986); *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992); *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996); *Avery v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 836 (Nov. 16, 2005).

5-2-204. Elements of culpability — Exceptions to culpable mental state requirement.

(a) A person does not commit an offense unless his or her liability is based on conduct that includes a voluntary act or the omission to perform an act that he or she is physically capable of performing.

(b) A person does not commit an offense unless he or she acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state.

(c) However, a culpable mental state is not required if:

(1) The offense is a violation unless a culpable mental state is expressly included in the definition of the offense; or

(2) An offense defined by a statute not a part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense.

History. Acts 1975, No. 280, § 202; A.S.A. 1947, § 41-202.

Meaning of “Arkansas Criminal Code”. See note to § 5-1-101.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

Controlled Substances — Arkansas Adopts the Useable Amount Standard. Harbison v. State, 302 Ark. 315, 790 S.W.2d 146 (1990), 13 UALR L.J. 583.

UALR L.J. Notes, Criminal Law —

CASE NOTES

ANALYSIS

Intent.
Mental state irrelevant.

Intent.

Being aware of one’s actions does not encompass the mental state required for a crime of specific intent as one may be cognizant of the circumstances and one’s actions yet not intend the result of them. Bowen v. State, 268 Ark. 1088, 598 S.W.2d 447 (Ct. App. 1980).

Because of the difficulty in ascertaining a person’s intent, a presumption exists that a person intends the natural and probable consequences of his acts. Tarentino v. State, 302 Ark. 55, 786

S.W.2d 584 (1990); Furr v. State, 308 Ark. 41, 822 S.W.2d 380 (1992).

Mental State Irrelevant.

Where mandatory language contained within § 27-53-101 did not explicitly enunciate any particular mental state, but instead stated that a driver of a vehicle involved in an accident resulting in death or injury to any person shall immediately stop the vehicle at the scene of the accident, this mandatory language was a clear indication that the accident-causing driver’s mental state was irrelevant. Stivers v. State, 354 Ark. 140, 118 S.W.3d 558 (2003).

Cited: Ellis v. State, 270 Ark. 243, 603 S.W.2d 891 (1980).

5-2-205. Causation.

Causation may be found when the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause unless:

(1) The concurrent cause was clearly sufficient to produce the result; and

(2) The conduct of the defendant was clearly insufficient to produce the result.

History. Acts 1975, No. 280, § 205; A.S.A. 1947, § 41-205.

CASE NOTES

ANALYSIS

Death.

Evidence.

Death.

Where conduct hastens or contributes to a person's death, it is a cause of the death. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989); *Porter v. State*, 308 Ark. 137, 823 S.W.2d 846 (1992).

Causation may be found notwithstanding that death occurred several years after the conduct in question took place. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Evidence.

There was substantial evidence that the defendants caused the death of their victim where the medical examiner's testimony, coupled with that of the eyewitnesses, was sufficient to prove that the victim died as a result of internal bleeding from the shots fired by the defendants. *Cox v. State*, 305 Ark. 244, 808 S.W.2d 306 (1991).

Cited: *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993); *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998).

5-2-206. Ignorance or mistake.

(a) It is a defense to a prosecution that the actor engaged in the conduct charged to constitute the offense under a mistaken belief of fact if:

(1) The statute defining the offense or a statute relating to the offense expressly provides that a mistaken belief of fact constitutes a defense; or

(2) Mistaken belief of fact establishes a defense of justification provided by § 5-2-601 et seq.

(b) Except as provided by subsection (c) of this section, a person is not relieved of criminal liability for conduct because he or she engages in that conduct believing that the conduct does not as a matter of law constitute an offense.

(c) It is an affirmative defense to a prosecution that the actor engaged in the conduct charged to constitute the offense believing that the conduct did not as a matter of law constitute an offense, if the actor acted in reasonable reliance upon an official statement of the law contained in:

(1) A statute or other enactment afterward determined to be invalid or erroneous;

(2) The latest judicial decision of the highest state or federal court that has decided the matter; or

(3) An official interpretation of a public servant or agency charged by law with responsibility for the interpretation or administration of the law defining the offense.

(d)(1) Although ignorance or mistake of fact would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he or she supposed.

(2) However, in a case described by subdivision (d)(1) of this section the ignorance or mistake of fact of the defendant reduces the class or degree of the offense of which he or she may be convicted to that of the

offense of which the defendant would be guilty had the situation been as he or she supposed.

(e) A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted is relevant to disprove the specific culpable mental state required by the statute under which the defendant is prosecuted.

History. Acts 1975, No. 280, § 206;
A.S.A. 1947, § 41-206.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

CASE NOTES

ANALYSIS

Jury instructions.
Mistake of law.
Official interpretation.

Jury Instructions.

In a trial in which defendant was convicted of failure to pay a motor vehicle use tax in violation of § 26-18-202, the trial court did not err in giving an instruction that ignorance of the law is not a defense to a crime in the State of Arkansas; it is not inconsistent to instruct the jurors that ignorance will not acquit a defendant outright, while also instructing them of the state's burden to prove the culpable mental state required to commit the offense. *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003).

Mistake of Law.

A prior Arkansas Supreme Court ruling on a completely different statute did not justify defendant's reliance on alleged "mistake of law." *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

Where the defendant neither relied on an invalid statute nor plead it as an affir-

mative defense, he was not entitled to rely on that statute. *Fowler v. State*, 283 Ark. 325, 676 S.W.2d 725 (1984).

Where defendant was charged with possession of gambling devices and a jury found him not guilty by mistake of law due to his reliance upon inapplicable law in operating his arcade business, defendant's assertion of the defense was an admission that he had engaged in illegal conduct and, because the jury found defendant's machines were illegal, the trial court did not err in ordering the machines forfeited and destroyed. *Mullins v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 727 (Nov. 18, 2004).

Official Interpretation.

The parole officer's silence on the question of whether the defendant could lawfully possess a firearm after the completion of his parole was not an "official statement of the law" under subdivision (c)(3) of this section. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Cited: *Wicker v. Goodwin*, 813 F. Supp. 676 (E.D. Ark. 1992).

5-2-207. Intoxication.

(a) Intoxication that is not self-induced intoxication is an affirmative defense to a prosecution if at the time a person engages in the conduct charged to constitute the offense the person lacks capacity to:

- (1) Conform his or her conduct to the requirements of the law; or
- (2) Appreciate the criminality of his or her conduct.

(b) As used in this section:

(1) "Intoxication" means a disturbance of a mental or physical capacity resulting from the introduction of alcohol, a drug, or another substance into the body; and

(2) "Self-induced intoxication" means intoxication caused by a substance that the actor knowingly introduces into his or her body and the actor knows or ought to know the tendency of the substance to cause intoxication.

History. Acts 1975, No. 280, § 207; 1977, No. 101, § 1; A.S.A. 1947, § 41-207.

RESEARCH REFERENCES

Ark. L. Notes. Liebman, Voluntary Intoxication as a Defense to Crime, 1983 Ark. L. Notes 29.

Malone and Hurst, Update: Voluntary Intoxication as a Defense to Crime, etc., 1987 Ark. L. Notes 91.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

Note, Defense of Involuntary Intoxication No Longer Available to Disprove Intent, etc., 9 UALR L.J. 657.

Survey—Criminal Law, 10 UALR L.J. 137.

Survey — Criminal Law, 12 UALR L.J. 183.

CASE NOTES

ANALYSIS

Constitutionality.

Burden of proof.

Evidence.

Instructions.

Self-induced intoxication.

Specific intent.

Constitutionality.

This section is constitutionally sound. Sullinger v. State, 310 Ark. 690, 840 S.W.2d 797 (1992).

Burden of Proof.

This section does not eliminate the state's burden to prove purposeful intent. Caldwell v. State, 322 Ark. 543, 910 S.W.2d 667 (1995), cert. denied, 517 U.S. 1124, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996).

Evidence.

Expert testimony as to the physiological effects of defendant's alcohol consumption to show that he lacked the requisite mental state to commit offense was properly excluded since voluntary intoxication is no longer available as a defense or admissible for the purpose of negating specific

intent. Pharo v. State, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

Testimony by medical doctor about blackout alcoholism in murder trial was simply another means of using voluntary intoxication as a defense, thus, the witness' testimony was properly excluded since voluntary intoxication was no longer a defense to criminal prosecutions. Spohn v. State, 310 Ark. 500, 837 S.W.2d 873 (1992).

Evidence was sufficient to support a finding of purposeful intent. Caldwell v. State, 322 Ark. 543, 910 S.W.2d 667 (1995), cert. denied, 517 U.S. 1124, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996).

Instructions.

Defendant's proffered instruction which merely emphasized his theory of the case that his intoxication should be considered as diminishing his capacity to form the requisite intent to commit capital murder was properly refused. Kemp v. State, 324 Ark. 178, 919 S.W.2d 943 (1996), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 334 (1996).

Self-Induced Intoxication.

Except in cases involving specific intent

crimes, voluntary intoxication is not a defense, even though it may produce a form of "temporary insanity" or render the person charged unconscious of what he is doing. *Gonce v. State*, 11 Ark. App. 278, 669 S.W.2d 490 (1984).

Voluntary intoxication is no longer available as a defense to criminal prosecutions. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992); *Spohn v. State*, 310 Ark. 500, 837 S.W.2d 873 (1992).

Drinking to the point of intoxication by an alcoholic is self-induced intoxication and therefore not covered by the involuntary intoxication defense. To hold otherwise would serve only to immunize a certain category of people from prosecution for their criminal conduct because of their addiction to alcohol. See *v. State*, 296 Ark. 498, 757 S.W.2d 947 (1988).

Specific Intent.

Where the crimes in this case were

committed when *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), was still the law, substantive law recognized the common law defense of voluntary intoxication to specific intent crimes, and the trial court erred in applying *State v. White*, 290 Ark. 130, 717 S.W.2d 784 (1986), retroactively eliminating a defense available at the time of the offense. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

Voluntary intoxication is not a defense to the charge of murder in the first degree or to the charge of battery in the second degree; voluntary intoxication is not available as a defense for purposes of negating specific intent. *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993).

Cited: *Bailey v. State*, 263 Ark. 470, 565 S.W.2d 603 (1978); *Hobgood v. Housewright*, 698 F.2d 962 (8th Cir. 1983); *Sullinger v. State*, 310 Ark. 690, 840 S.W.2d 797 (1992).

5-2-208. Duress.

(a) It is an affirmative defense to a prosecution that the actor engaged in the conduct charged to constitute an offense because the actor reasonably believed he or she was compelled to engage in the conduct by the threat or use of unlawful force against the actor's person or the person of another that a person of ordinary firmness in the actor's situation would not have resisted.

(b) The affirmative defense provided by this section is unavailable if the actor recklessly placed himself or herself in a situation in which it was reasonably foreseeable that the actor would be subjected to the force or threatened force described in subsection (a) of this section.

History. Acts 1975, No. 280, § 208; A.S.A. 1947, § 41-208.

RESEARCH REFERENCES

Ark. L. Rev. The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

CASE NOTES

ANALYSIS

In general.
Accomplices.
Evidence.

Standard of proof.

In General.

The defense of duress requires that at the time of the conduct constituting the

offense the actor suffers an impairment of his ability to control his conduct such that he cannot properly be held accountable for it. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Where a psychologist testified that he did not believe defendant was any more susceptible to reacting to his co-defendant differently than anyone else, defendant could not demonstrate how he was prejudiced by the exclusion of the psychologist's complete testimony regarding the co-defendant's borderline personality disorder. *Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002).

Defendant's claim that she was acting in a state of extreme emotional disturbance as a result of fear of her husband, i.e. that she was acting out of duress, was an attempt to mitigate the crime of intentional killing her mother to voluntary manslaughter; as the affirmative defense of duress was available to defendant as a complete defense, this argument was not available to mitigate the charge of murder to manslaughter. *MacKool v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 498 (Sept. 22, 2005).

Accomplices.

The trial court did not err by refusing to declare witness an accomplice as a matter of law; the evidence was such that it was appropriate for the jury to decide whether his participation was under duress under this section and thus that it was not his

purpose to aid in the commission of the crime. *Cole v. State*, 323 Ark. 8, 913 S.W.2d 255 (1996).

Evidence.

Evidence insufficient to find that the defendant acted under duress. *Johnson v. State*, 266 Ark. 514, 587 S.W.2d 3 (1979); *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981).

The court in a murder prosecution did not err in refusing to instruct the jury with regard to duress where (1) the defendant did not testify and presented no witnesses, and (2) the only evidence of the defendant's defense was presented through his tape-recorded statement, which, at best, amounted to a claim of self-defense, as opposed to duress. *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998).

Standard of Proof.

The coercion of the defendant had to appear from all the facts and circumstances, and could not be presumed merely from his presence. *Edwards v. State*, 27 Ark. 493 (1872) (decision under prior law).

The standard used to measure a person of ordinary firmness takes into account the actor's "situation." Factors to be considered in determining that situation are those that differentiate the actor from another, such as size, strength, age or health; matters of temperament are not considered. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

5-2-209. Entrapment.

(a) It is an affirmative defense that the defendant was entrapped into committing an offense.

(b)(1) Entrapment occurs when a law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense.

(2) Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

History. Acts 1975, No. 280, § 209; A.S.A. 1947, § 41-209.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

United States v. Jacobson: A Call for Reasonable Suspicion of Criminal Activity

as a Threshold Limitation on Governmental Sting Operations, 44 Ark. L. Rev. 493.

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

CASE NOTES

ANALYSIS

In general.

Purpose.

Admission of crime.

Burden of proof.

Conduct of law officer.

Defendant's conduct and predisposition.

Elements of defense.

Evidence.

Question of law or fact.

In General.

This section focuses the inquiry so as to attribute more importance to the conduct of the law enforcement officers than to any predisposition of the defendant, and the question is directed to the effect of that conduct on "normally law-abiding persons." *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985).

Entrapment is not a collateral issue. *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Purpose.

The purpose of this section is to discourage government conduct that might induce innocent persons to engage in criminal conduct. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Riddling v. State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

Admission of Crime.

In order to raise the defense of entrapment, a defendant must admit the crime. *Gipson v. Lockhart*, 692 F.2d 66 (8th Cir. 1982); *Morris v. State*, 300 Ark. 340, 779 S.W.2d 526 (1989).

When the entrapment defense is invoked it is necessarily assumed that the act charged was committed, and where a defendant insists that he did not commit the acts he is charged with, one of the bases of the entrapment defense is absent and he is not entitled to that defense. *Smith v. State*, 34 Ark. App. 72, 805 S.W.2d 663 (1991); *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Where defendant denied having committed the act charged, he was not entitled to proceed with evidence of the defense of entrapment, and exclusion of testimony relating to officer's conduct was not error. *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Burden of Proof.

Entrapment must be proved by the defendant by a preponderance of the evidence. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Rhoades v. State*, 270 Ark. 962, 607 S.W.2d 76 (Ct. App. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3048, 69 L. Ed. 2d 417 (1981); *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982); *Walls v. State*, 8 Ark. App. 315, 652 S.W.2d 37, aff'd, 280 Ark. 291, 658 S.W.2d 362 (1983); *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984); *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985); *Wedgeworth v. State*, 301 Ark. 91, 782 S.W.2d 357 (1990); *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992); *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992).

The defendant has the burden of proving he was entrapped. *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989).

Conduct of Law Officer.

In determining the existence of entrapment, primary importance is accorded to the conduct of a law enforcement officer, or the person acting in cooperation with him. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Mullins v. State*, 265 Ark. 811, 580 S.W.2d 941 (1979); *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Conduct of a law enforcement officer or informant merely affording the accused the opportunity to do that which he is otherwise ready, willing and able to do is not entrapment. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989).

This section places emphasis on the conduct of the law enforcement officer or persons cooperating with him in determining whether the officer has induced the commission of the offense by persuasion or has merely afforded a person who is ready, willing and able to commit the offense the opportunity of doing so. *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982); *Walls v. State*, 8 Ark. App. 315, 652 S.W.2d 37, *aff'd*, 280 Ark. 291, 658 S.W.2d 362 (1983).

This section attributes more importance to the conduct of the law enforcement officer than to any predisposition of the defendant. *Riddling v. State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

Defendant's Conduct and Predisposition.

Defendant's conduct and predisposition, both prior to and concurrent with, the transactions forming the basis of the charges are still material and relevant, on the question whether the government agents only afforded the opportunity to commit the offenses with which he is charged. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989).

The defendant's conduct and predisposition both prior to and concurrent with the transaction are material and relevant on the question of whether the accused was only afforded the opportunity to commit the offenses. *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982).

Entrapment does not occur when government agents merely afford one the opportunity to do that which he already has a predisposition to do. *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984); *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989).

Entrapment instruction not given in a drug possession case where package delivery service and police officers provided defendant the opportunity to commit the crime, but did not induce or persuade him to commit the crime. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Elements of Defense.

"Unconscious commission" of an unlawful act is not an element in the defense of entrapment. *French v. State*, 260 Ark. 473, 541 S.W.2d 680 (1976).

Evidence.

Exclusion of evidence of law officer's

conduct held to be error. *French v. State*, 260 Ark. 473, 541 S.W.2d 680 (1976); *Brascomb v. State*, 261 Ark. 614, 550 S.W.2d 450 (1977).

The accused should be allowed a reasonable latitude in presenting whatever facts and circumstances he claims constitute an entrapment subject to ordinary rules of admissibility. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Any evidence having any tendency to make the existence of entrapment more probable is admissible. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Young v. State*, 308 Ark. 647, 826 S.W.2d 814 (1992).

Any statement made by informant, or in the presence of defendant, indicative of the fact that informant was using persuasion or other means to induce a normally law-abiding person to commit an offense was admissible, not to show the truth of informant's statements, but to show that they were made. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

Testimony was relevant and not inadmissible as hearsay since it showed the informant's intent, plan, motive or design. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

Evidence insufficient to establish entrapment. *Rhoades v. State*, 270 Ark. 962, 607 S.W.2d 76 (Ct. App. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3048, 69 L. Ed. 2d 417 (1981); *Womack v. State*, 301 Ark. 193, 783 S.W.2d 33 (1990).

Evidence of other acts or crimes is usually admissible in rebuttal to the defense of entrapment. *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984).

The trial court erred in excluding evidence of events that occurred after the transaction when the defendant sold the cocaine to the undercover agent where this evidence would help establish his defense of entrapment by showing that the law enforcement officers desired to have him help them catch "bigger fish," and when he refused to help them in this regard, he was prosecuted for the transaction. *Riddling v. State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

Where there was evidence of entrapment in the state's evidence-in-chief, a video tape of a meeting between a police informant and the defendant was inadmissible in the state's case-in-chief to

show the defendant's predisposition to sell a controlled substance. *Riddling v. State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

The trial court was incorrect in ruling that the defense should not refer to the word entrapment during the trial because entrapment had not been pled, in light of the fact the state acknowledged that it had been put on notice that the defense would be raised. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Court's ruling that defense could not present evidence on entrapment because it had not been pled was harmless error since defendant was permitted to put on his evidence relating to his theory of entrapment and because the trial court was correct in declining to instruct the jury on the defense because there was no evidence to support it. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Where there was evidence that informant was paid for his efforts, but there was no additional evidence tending to show that informant induced defendant into committing the offense, the trial court properly refused to instruct the jury on entrapment. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

Where defendant, having the burden of proof, failed to present any evidence to indicate that he was induced by governmental conduct of a character likely to cause a normally law-abiding person to commit the offense, of which he had been convicted, it was not error for the trial court to refuse to give defendant's proposed instruction on entrapment. *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992).

Question of Law or Fact.

Where the evidence was in conflict on the question of entrapment, it presented a question of fact for the trial court as to whether defendant had carried his burden of proof. *Leeper v. State*, 264 Ark. 298, 571 S.W.2d 580 (1978).

Ordinarily, entrapment is a fact question which is properly submitted to the jury, and entrapment as a matter of law is only established if there is no factual issue to be resolved. *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362, aff'd, 280 Ark. 291, 658 S.W.2d 362 (1983); *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989); *Wedge-worth v. State*, 301 Ark. 91, 782 S.W.2d 357 (1990).

Entrapment is ordinarily a fact question. *Riddling v. State*, 19 Ark. App. 231, 719 S.W.2d 1 (1986).

Entrapment is not required to be found as a matter of law when the testimony of the accused, showing entrapment, is not rebutted by evidence presented by the state. *McCaslin v. State*, 298 Ark. 335, 767 S.W.2d 306 (1989).

There was no basis for finding entrapment as a matter of law because factual issues clearly had to be resolved in deciding the issue where informant testified that he never threatened defendant by saying he would notify the press of defendant's drug abuse and defendant testified that informant did make such a threat. *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995).

Cited: *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991).

SUBCHAPTER 3 — MENTAL DISEASE OR DEFECT

SECTION.

- 5-2-301. Definitions.
- 5-2-302. Lack of fitness to proceed generally.
- 5-2-303. Admissibility of evidence to show mental state.
- 5-2-304. Notice requirement.
- 5-2-305. Mental health examination of defendant.
- 5-2-306. Access to defendant by examiners of his choice.
- 5-2-307. Admissibility of statements made during examination or treatment.
- 5-2-308. Expert witnesses.

SECTION.

- 5-2-309. Determination of fitness to proceed.
- 5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.
- 5-2-311. Lack of fitness to proceed — Motions without defendant's personal participation.
- 5-2-312. Lack of capacity — Affirmative defense.
- 5-2-313. Acquittal based on mental health report.
- 5-2-314. Acquittal — Examination of defendant — Hearing.

SECTION.

5-2-315. Discharge or conditional release.
 5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

SECTION.

5-2-317. Jurisdiction and venue.
 5-2-318 — 5-2-324. [Reserved.]
 5-2-325. [Repealed.]

A.C.R.C. Notes. This subchapter and § 16-86-101 et seq., which concerns the “insanity defense” and the alleged mental disease or defect of the defendant, may have conflicting provisions.

Publisher’s Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Procedure when insanity an issue, § 16-86-101 et seq.

Effective Dates. Acts 1979, No. 886, §§ 2, 4: July 1, 1979. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that this Act is necessary to insure continued examination of those defendants committed to the State Hospital by the courts. Therefore, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after July 1, 1979.”

Acts 1989, Nos. 645 and 911, § 9: June 1, 1989. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present procedures for the commitment and discharge of insanity acquittees at the State Hospital are inadequate to protect the public and it is necessary to preserve the public peace, health and safety. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after June 1, 1989.”

Acts 1989, No. 898, § 4: Mar. 22, 1989. Emergency clause provided: “The Mental Health Staff of the Department of Correction is dedicated to treatment of those under the care and custody of the Department once commitment occurs, after determination of sanity. Determination of sanity is an area of expertise provided by other areas of the community, including but not limited to the State Hospital. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1995, No. 767: Mar. 24, 1995. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that recent serious random acts of violence committed by insanity acquittees have heightened the awareness of the General Assembly to provide a mechanism whereby those persons can be tracked and nearby residence can be warned of their whereabouts so precautions may be taken to protect lives and property. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

ALR. Bifurcated criminal trial on issue of insanity defense. 1 ALR 4th 884.

Adequacy of defense counsel’s representation of criminal client regarding incompetency, insanity, and related issues. 2 ALR 4th 27, 17 ALR 4th 575.

Test of criminal responsibility: state cases. 9 ALR 4th 526.

Competency to stand trial of criminal defendant diagnosed as “mentally retarded”. 23 ALR 4th 493.

Competency to stand trial of criminal defendant diagnosed as “schizophrenic.” 33 ALR 4th 1062.

Admissibility of results of computer analysis of defendant’s mental state. 37 ALR 4th 510.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 37 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

Sullivan, Psychiatric Defenses in Ar-

kansas Criminal Trials, 48 Ark. L. Rev. C.J.S. 22 C.J.S., Crim. L., § 55 et seq. 439.

CASE NOTES

ANALYSIS

Constitutionality.
Power of the court.

Constitutionality.

Sections of the Arkansas Criminal Code providing procedures for commitment and release of persons charged with a crime are not facially or inherently unconstitutional. *Coley v. Clinton*, 479 F. Supp. 1036 (E.D. Ark. 1979), modified on other grounds, 635 F.2d 1364 (8th Cir. 1980).

Power of the Court.

The intent behind Ark. Const., Art. 7, § 34, cannot be construed to alter the inherent power of the law courts to deal with the defense of insanity since there is no conceivable way that circuit courts can be deprived altogether of jurisdiction to deal with insanity matters where they are incidental to criminal charges. *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981).

Cited: *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

5-2-301. Definitions.

As used in this subchapter:

(1) “Appropriate facility” means any facility within or without this state to which a defendant is eligible for admission and treatment for mental disease or defect;

(2) “Capacity of the defendant to have the culpable mental state” means a defendant’s ability to have the culpable mental state necessary to establish an element of the offense charged, as defined in § 5-2-202;

(3) “Compliance monitor” means either a social service representative or licensed social worker, or both, employed by the Department of Health and Human Services for the purpose of, including, but not limited to:

(A) Verifying that a person conditionally released pursuant to a provision of this subchapter is in compliance with the conditions for release;

(B) Providing social service assistance to a person conditionally released pursuant to a provision of this subchapter; and

(C) Reporting compliance with the conditions for release or lack of compliance with the conditions for release to the appropriate circuit court;

(4) “Designated receiving facility or program” means an inpatient or outpatient treatment facility or program that is designated within each geographic area of the state by the Director of the Division of Behavioral Health of the Department of Health and Human Services to accept the responsibility for the care, custody, and treatment of a person involuntarily admitted to the state mental health system;

(5)(A) “Mental disease or defect” means a:

(i) Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life;

(ii) State of significantly subaverage general intellectual functioning existing concurrently with a defect of adaptive behavior that developed during the developmental period; or

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain injury.

(B) As used in the Arkansas Criminal Code, “mental disease or defect” does not include an abnormality manifested only by:

(i) Repeated criminal or otherwise antisocial conduct;

(ii) Continuous or noncontinuous periods of intoxication, as defined in § 5-2-207(b)(1), caused by a substance such as alcohol or a drug;

(iii) Dependence upon or addiction to any substance such as alcohol or a drug;

(6) “Prescribed regimen of medical, psychiatric, or psychological care or treatment” means to care or treatment for a mental illness, as defined in § 20-47-202;

(7) “Qualified psychiatrist” means a licensed psychiatrist who has successfully completed either a post-residency fellowship in forensic psychiatry accredited by the American Board of Psychiatry and Neurology or a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(8) “Qualified psychologist” means a licensed psychologist who has received a post-doctoral diploma in forensic psychology accredited by the American Board of Professional Psychology or successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter; and

(9) “State mental health system” means the Arkansas State Hospital and any other facility or program certified by the Division of Behavioral Health of the Department of Health and Human Services.

History. Acts 1975, No. 280, § 616; A.S.A. 1947, § 41-616; Acts 1995, No. 767, § 1; 1997, No. 922, § 1; 2001, No. 1554, § 1.

Amendments. The 2001 amendment deleted “the George W. Jackson Community Mental Health Center in Jonesboro” following “Arkansas State Hospital” in present (9); inserted “either a post-resi-

dency ... and Neurology or” in present (7); inserted “and who is currently ... in this subchapter” in present (7) and (8); inserted “received a post-doctoral ... Professional Psychology or” in present (8); and added present (2) and (5) and made related changes.

Meaning of “Arkansas Criminal Code”. See note to § 5-1-101.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-2-302. Lack of fitness to proceed generally.

(a) No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

(b) A court shall not enter a judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect.

History. Acts 1975, No. 280, § 603; A.S.A. 1947, § 41-603; Acts 2001, No. 1554, § 2.

Amendments. The 2001 amendment

added (b); and made gender neutral changes throughout.

Cross References. Allegation of insanity of convicted defendant, § 16-86-111.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Construction.
Amnesia.
Burden of proof.
Competency.
Due process.
Evidence.
Intoxication.
Jurisdiction.
Review.

Construction.

This section, which precludes trial, conviction, or sentencing of a person who lacks capacity to understand the proceedings or assist in his defense, does not conflict with § 5-2-313 which specifically provides for a judgment of acquittal of such person. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980).

Amnesia.

Amnesia or lack of memory is not an adequate ground for holding a defendant incompetent to stand trial. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

Burden of Proof.

A defendant in a criminal case is ordinarily presumed to be mentally competent

to stand trial, and the burden of proving incompetence is upon the defendant. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

Competency.

In order to be competent to stand trial, a defendant must have the capacity to understand the nature and object of the proceedings brought against him, to consult with counsel, and to assist in the preparation of his defense. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled on other grounds by *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

For a finding of fitness to stand trial, this section does not require that the accused be able to identify with specificity the charges filed against him or her, as in the distinction between first degree murder and capital murder, instead it requires only that the accused understand the proceedings. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996).

A criminal defendant is presumed to be competent, and the burden of proving incompetence is on the accused; the test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and

whether he has a rational, as well as factual, understanding of the proceedings against him. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001).

Where physician testified the only disorder defendant suffered from was antisocial personality disorder and that defendant understood the charges against him, as well as the role of the trial judge, prosecutor, and defense counsel, and where the record revealed that defendant stated in open court that he had instructed his attorneys to file a motion to dismiss and in another instance wrote a letter to the trial judge seeking new counsel and discussing the nature of judicial proceedings, the trial court did not err in finding defendant competent to stand trial. *Ware v. State*, 348 Ark. 181, 75 S.W.3d 165 (2002).

Due Process.

The conviction of an accused while he is legally incompetent to stand trial violates due process. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled on other grounds by *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Where evidence showed that defendant was delusional while on trial, the trial judge should have halted the trial and made a new determination of competency; while the failure to hold a further competency hearing violated due process, the proper remedy was not to grant the writ of habeas corpus, but to conduct a post-conviction competency hearing. *Reynolds v. Norris*, 86 F.3d 796 (8th Cir. 1996).

Evidence.

Trial court did not err by finding defendant competent to stand trial where an uncontradicted report stated defendant was able to understand the proceedings against him and assist in his own defense. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

Despite conflicting expert testimony, trial court's determination of defendant's competency stands if there is substantial evidence to support the court's finding.

Mauppin v. State, 314 Ark. 566, 865 S.W.2d 270 (1993).

Evidence supported the court's ruling of competency. *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996).

Intoxication.

A person who is so intoxicated as to be unable to understand the proceedings or effectively participate in his defense ought not to be tried until that incapacity has been removed. *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991), supplemental op., reh'g denied, 1991 Ark. App. LEXIS 212 (1991).

Although defendant's blood alcohol level registered at a level higher than that required to presume intoxication when tested before entering the court room for trial, neither a continuance nor mistrial were required where defendant appeared to be coherent and able to assist counsel, and where defense counsel failed to renew motion for a continuance at any time during the trial after having full opportunity to observe and confer with his client. *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991), supplemental op., reh'g denied, 1991 Ark. App. LEXIS 212 (1991).

Jurisdiction.

Where the accused was never acquitted by the circuit court, but was found to be unable to cooperate effectively with his attorney in the preparation of his defense and the proceedings against him were suspended, the circuit court never lost jurisdiction to the probate court. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

Review.

On review of a finding of fitness to stand trial, the appellate court will affirm if there is substantial evidence to support the trial court's finding. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996).

Cited: *Branham v. State*, 274 Ark. 109, 623 S.W.2d 1 (1981); *Jacobs v. State*, 294 Ark. 551, 744 S.W.2d 728 (1988); *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

5-2-303. Admissibility of evidence to show mental state.

Evidence that the defendant suffered from a mental disease or defect is admissible to prove whether the defendant had the kind of culpable mental state required for commission of the offense charged.

History. Acts 1975, No. 280, § 602; A.S.A. 1947, § 41-602.

CASE NOTES

ANALYSIS

Instructions.
Relevancy.

Instructions.

A defendant was not entitled to a specific instruction informing the jury that he had placed in issue his mental capacity to form the kind of mental state necessary to establish the commission of the alleged offense. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

A trial judge need not give an instruction with regard to the defendant's possession of the kind of culpable mental state required for the commission of the offense charged in addition to giving an instruc-

tion on the issue of mental disease or defect. *Westbrook v. State*, 274 Ark. 309, 624 S.W.2d 433 (1981).

Relevancy.

The nature, extent and location of wounds were relevant and material on the questions of intent and state of mind and, even if the mental disease or defect did not constitute a defense, evidence of it was relevant on the question of his culpable mental state and especially on the element of premeditation. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Cited: *Catlett v. State*, 321 Ark. 1, 900 S.W.2d 523 (1995); *Westbrook v. Norris*, 923 F. Supp. 1129 (E.D. Ark. 1996).

5-2-304. Notice requirement.

(a) When a defendant intends to raise mental disease or defect as a defense in a prosecution or put in issue his or her fitness to proceed, the defendant shall notify the prosecutor and the court at the earliest practicable time.

(b)(1) Failure to notify the prosecutor within a reasonable time before the trial date entitles the prosecutor to a continuance that for limitation purposes is deemed an excluded period granted on application of the defendant.

(2) Alternatively, in lieu of suspending any further proceedings under § 5-2-305, the court may order the immediate examination of the defendant at a designated receiving facility or program by a qualified psychiatrist or a qualified psychologist.

History. Acts 1975, No. 280, § 604; 1977, No. 360, § 1; A.S.A. 1947, § 41-604; Acts 1995, No. 767, § 2.

Cross References. Plea of insanity when period before trial short or insanity alleged after charge, § 16-86-108.

CASE NOTES

Failure to Give Timely Notice.

The defendant was not improperly denied his right to present a defense of mental disease or defect or alternatively to put on psychiatric testimony to negate the element of intent where (1) he had not formally raised the defense as late as one day before trial, but instead stated that he reserved the right to raise the insanity defense until he could cross-examine a physician who had indicated that the de-

fendant might show signs of mental illness, and (2) the trial judge had directed the defendant to give notice of such affirmative defense 10 days before trial, but he chose not to do so, and only did so midway into the state's case. *Copeland v. State*, 343 Ark. 327, 37 S.W.3d 567 (2001).

Cited: *Clark v. State*, 260 Ark. 479, 541 S.W.2d 683 (1976); *Thorne v. State*, 269 Ark. 556, 601 S.W.2d 886 (1980); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419

(1983); *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989); *Walker v. State*, 303 Ark. 401, 797 S.W.2d 447 (1990); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998); *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996).

5-2-305. Mental health examination of defendant.

(a)(1) Subject to the provisions of §§ 5-2-304 and 5-2-311, the court shall immediately suspend any further proceedings in a prosecution if:

(A) A defendant charged in circuit court files notice that he or she intends to rely upon the defense of mental disease or defect;

(B) There is reason to believe that the mental disease or defect of the defendant will or has become an issue in the cause;

(C) A defendant charged in circuit court files notice that he or she will put in issue his or her fitness to proceed; or

(D) There is reason to doubt the defendant's fitness to proceed.

(2)(A) If a trial jury has been impaneled, the court may retain the jury or declare a mistrial and discharge the jury.

(B) A discharge of the trial jury is not a bar to further prosecution.

(b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(A) Directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists or qualified psychologists;

(B) Appointing one (1) or more qualified psychiatrists not practicing within the Arkansas State Hospital to make an examination and report on the mental condition of the defendant; or

(C) Directing the Director of the Division of Behavioral Health of the Department of Health and Human Services to determine who will examine and report upon the mental condition of the defendant.

(2) The Director of the Division of Behavioral Health of the Department of Health and Human Services or his or her designee shall determine the location of the forensic examination.

(3) The forensic examination shall be for a period not exceeding thirty (30) days or such longer period as the Director of the Division of Behavioral Health of the Department of Health and Human Services or his or her designee determines to be necessary for the purpose of the forensic examination.

(4)(A)(i) A uniform evaluation order shall be developed by the Administrative Office of the Courts, the Office of the Prosecutor Coordinator, and the Department of Health and Human Services.

(ii) At a minimum the uniform evaluation order shall contain the:

(a) Defendant's name, age, gender, and race;

(b) Charges pending against the defendant;

(c) Defendant's attorney's name and address;

(d) Defendant's custody status;

(e) Case number; and

(f) Case number and a unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center.

(iii) The uniform evaluation order shall be utilized any time that a defendant is ordered to be examined by the court pursuant to this section and a copy of the uniform evaluation order shall be forwarded to the Director of the Department of Health and Human Services or his or her designee.

(iv) No forensic examination shall be conducted without using the uniform evaluation order.

(B)(i) The Division of Behavioral Health of the Department of Health and Human Services shall maintain a database of all examinations of defendants performed pursuant to this chapter.

(ii)(a) At a minimum the database shall contain the information on the uniform evaluation order as provided in subdivision (b)(4)(A)(ii) of this section.

(b) Additionally, the database shall track insanity acquittees and their conditional release.

(c) Upon completion of a forensic examination pursuant to subsection (b) of this section, the court may enter an order providing for further examination and may order the defendant committed to the Arkansas State Hospital or other appropriate facility for further examination and observation if the court determines that commitment and further examination and observation are warranted.

(d)(1) A report of a forensic examination shall include the following:

(A) A description of the nature of the forensic examination;

(B) A substantiated diagnosis in the terminology of the American Psychiatric Association's current edition of the Diagnostic and Statistical Manual;

(C) An opinion on whether the defendant lacks the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense as a consequence of mental disease or defect;

(D) A description of any evidence that the defendant is feigning a sign or symptom of mental disease or defect;

(E)(i) When directed by the court, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired at the time of the conduct alleged.

(ii) An opinion under subdivision (d)(1)(E)(i) of this section shall also include a description of the reasoning used by the examiner to support the opinion; and

(F)(i) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

(ii) An opinion under subdivision (d)(1)(F)(i) of this section shall also include a description of the reasoning used by the examiner to support the opinion.

(2) In addition to the information required in subdivision (d)(1) of this section, the report of the forensic examination shall include a separate explanation of:

(A) The sign or symptom of mental disease or defect that led to the opinion on the presence of mental disease or defect; and

(B) The evidence that supports the opinion of the examiner on the capacity of the defendant to understand the proceedings against him or her and the defendant's capacity to assist in his or her own defense.

(e) If a forensic examination cannot be conducted because of the unwillingness of the defendant to participate in the forensic examination, the report of the forensic examination shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant is the result of mental disease or defect.

(f)(1) A person designated to perform a forensic examination shall file the report of the forensic examination with the clerk of the court, and the clerk of the court shall mail a copy to the defense attorney and a copy to the prosecuting attorney.

(2) Upon entry of an order by a circuit court, a copy of the report of the forensic examination concerning a defendant shall be provided to the circuit court by the person designated to perform the forensic examination.

(g)(1) Notwithstanding the provision of any statute enacted prior to January 1, 1976, any existing medical or pertinent record in the custody of a public agency shall be made available to the examiner and counsel for inspection and copying.

(2) The court shall require the prosecuting attorney to provide to the examiner any information relevant to the forensic examination, including, but not limited to:

(A) The name and address of any attorney involved in the matter;

(B) Information about the alleged offense; and

(C) Any information about the defendant's background that is deemed relevant to the forensic examination, including the criminal history of the defendant.

(3) The court may require the attorney for the defendant to provide any available information relevant to the forensic evaluation, including, but not limited to, a:

(A) Psychiatric record;

(B) Medical record; or

(C) Record pertaining to treatment of the defendant for substance or alcohol abuse.

(h)(1) The cost of a forensic examination other than an examiner retained by the defendant shall be borne by the state.

(2)(A) If the Director of the Division of Behavioral Health of the Department of Health and Human Services admits the defendant to the Arkansas State Hospital for a forensic examination, room and board costs shall also be borne by the state so long as the Arkansas State Hospital has actual physical custody of the defendant for the evaluation, observation, or treatment of the defendant.

(B)(i) However, when a forensic examination of the defendant has been completed, the county from which the defendant had been sent for the forensic examination shall procure the defendant within three (3) working days from the Arkansas State Hospital or from a designated receiving facility or program or other facility where the forensic examination was performed.

(ii) If the county fails to procure the defendant within this three-day period, the county shall bear any room or board costs on the fourth and subsequent days.

(i) A person under commitment and supervision of the Department of Correction who is a defendant charged in circuit court shall not undergo an examination or observation conducted by a psychiatrist or other mental health employee of the Department of Correction to determine the mental condition of the defendant.

History. Acts 1975, No. 280, § 605; 1977, No. 360, § 2; 1979, No. 886, § 1; 1983, No. 191, § 3; A.S.A. 1947, § 41-605; Acts 1989, No. 645, §§ 5, 6; 1989, No. 898, § 1; 1989, No. 911, §§ 5, 6; 1995, No. 767, § 3; 2001, No. 1554, § 3.

A.C.R.C. Notes. As amended by Acts 1995, No. 767, § 3, the last sentence in (b)(4)(A) began: "After July 1, 1995."

Publisher's Notes. Acts 1989, No. 645, § 8, provided: "It is the express intent of this act to adopt the standards for committing insanity acquittees and the automatic commitment procedures as authorized by *Jones v. United States*, 463 U. S.

354, 103 S. Ct. 3043, 77 L.Ed.2d 694 (1993) and *United States v. Wallace*, 845 F.2d 1471 (8th Cir. 1988)."

Amendments. The 2001 amendment rewrote this section.

Cross References. Admission to State Hospital — Report, § 16-86-104.

Examination and observation, § 16-86-103.

Examination and observation — Costs, § 16-86-105.

Examination and observation generally, § 16-86-102.

Request for examination upon defense of insanity for felony charge, § 16-86-107.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments: Criminal Law: Placing Burden of Proof on Defendant to Show Issue of Insanity Found Constitutional, 33 Ark. L. Rev. 433.

UALR L.J. Note, Constitutional Law — Indigent Defense — Arkansas Statutory

Fee and Expense Limitations Unconstitutional. *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), 14 UALR L.J. 595.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Purpose.

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Purpose.

The intent of this section is to prevent the trial of any person while incompetent to understand the nature of the procedures involved and to assist in the defense thereof; and this section is designed to prevent the trial of a person who lacks the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of

the offense. *Ball v. State*, 278 Ark. 423, 646 S.W.2d 693 (1983); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

Applicability.

This section is inapplicable to a sentence revocation hearing; thus, the decision whether to provide psychiatric assistance to one facing a revocation hearing, like the decision concerning entitlement to counsel, must be on a case by case basis, and while due process must be accorded the defendant, there is no entitlement to the full range of criminal trial safeguards because the court is not dealing with a person who had yet to be convicted of anything. *Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990).

Access to Records.

Defendant was denied crucial evidence to aid in his defense when he was not furnished the full records of the state hospital relating to two prior commitments to the state hospital. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

Where a court ordered the mental examination of a defendant, it was prejudicial error to deny him access to the reports and records of the state mental hospital and a regional mental health center regarding such examinations. *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Compliance with Section.

Evidence was sufficient to find that there was compliance with the statutory requirement as to a mental examination. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980).

Where psychiatrist's report raises a reasonable doubt about defendant's competency to stand trial, the trial court should order a full examination and report pursuant to subsection (c) and, if warranted by the report, should conduct a determination of fitness to proceed pursuant to § 5-2-309. *Jacobs v. State*, 294 Ark. 551, 744 S.W.2d 728 (1988).

The examination, conducted during defendant's stay at the state hospital, by a doctor, who was admittedly a psychologist rather than a psychiatrist, substantially complied with the statute. *Hubbard v.*

State, 306 Ark. 153, 812 S.W.2d 107 (1991).

Where a defendant is evaluated by the state hospital, such an evaluation complies with the examination requirements of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991).

Where report explicitly referred to the defendant's history of substance abuse, incarceration for delinquency, and psychiatric problems, even though examiner may not have had before him the full medical, psychiatric, and delinquency records of the defendant, report substantially complied with the requirements of state law. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Defendant was not denied due process when the state failed to comply strictly with the trial court's order committing him to the Arkansas State Hospital for a mental evaluation; although defendant was not transferred to the State Hospital, he was examined by doctors from the State Hospital, which was held to be substantial compliance with the order and with the examination requirements found in this section. *Hufford v. State*, 314 Ark. 181, 861 S.W.2d 108 (1993).

The appointment of a psychiatrist was not required under this section; substantial compliance with this section through an evaluation by a psychologist was enough. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994).

The trial court did not err in failing to order a psychiatric evaluation by the state hospital where the trial court correctly determined that the evaluation by a local, approved psychologist was a proper alternative and was in compliance with this section. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995).

Continuance denied even though psychiatric report had not been filed in strict compliance with subsection (d) of this section where defendant failed to show any prejudice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996).

Trial court committed reversible error by failing to immediately suspend the proceedings in defendant's trial for first degree murder and order a psychiatric evaluation upon defendant's motion requesting that an evaluation be done. *Kelly*

v. State, 80 Ark. App. 126, 91 S.W.3d 526 (2002).

Trial court erred in deeming defendant's federal mental evaluation sufficient to satisfy Arkansas' mandatory statutory scheme governing state mental evaluations found under this section; the trial judge's decision was a gross abuse of his discretion that warranted the granting of a writ of certiorari. *Smith v. Fox*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 487 (Sept. 16, 2004).

Costs.

Due process of law does not require the state to furnish expenses for a defendant to shop from doctor to doctor until he finds one who considers him mentally incompetent. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 470 U.S. 1085, 105 S. Ct. 1847, 85 L. Ed. 2d 145 (1985).

Youthfulness, immaturity and intelligence are all matters that can properly be presented to the jury for consideration as mitigating circumstances, but are not constitutionally recognized defenses requiring state funding. *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985).

Trial court properly denied defendant funds to pay for expert testimony about his mental condition as it related to mitigating circumstances where defendant was not prejudiced because defense counsel hired, and personally paid, a clinical psychologist to examine defendant and testify. *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, cert. denied, 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991).

Examination Report.

Where the psychiatrist's report regarding the defendant's fitness to stand trial substantially complied with the requirements of subsection (d), the trial court did not err in requiring the defendant to proceed to trial, even though the report was not in the exact terms of this section. *Ball v. State*, 278 Ark. 423, 646 S.W.2d 693 (1983).

Hearing.

Evidence sufficient to find that there was no prejudicial error in the conduct of the competency hearing. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980).

A pre-trial hearing on the morning of trial, where the court considered the propriety of defendant's withdrawal of his

incompetency defense before allowing the case to proceed, complied with procedural due process requirements. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

Implied Repeal.

This section did not impliedly repeal the provisions of former §§ 16-86-105 and 59-401 (repealed). *Mears v. Arkansas State Hosp.*, 265 Ark. 844, 581 S.W.2d 339 (1979).

Mental Fitness at Issue.

Where the defendant's own psychologist was not able to testify as to any probability that mental disease existed and there was no argument or demonstration that had the defendant undergone an evaluation he would have been able to negate that finding, the trial court was not given "reason to believe" that mental disease or fitness to proceed were at issue. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

The defendant's constitutional rights were duly protected where the trial court ordered, upon the defendant's raising the defense of mental disease or defect, the state hospital to evaluate the defendant's capacity to assist in his defense and to determine the state of his sanity on the date the alleged offense occurred. *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987), cert. denied, 498 U.S. 943, 111 S. Ct. 352, 112 L. Ed. 2d 316 (1990).

Under subdivision (a)(2) of this section, the court may raise the incompetency defense on its own at any time it has "reason to doubt" a defendant's fitness to proceed. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

Mental disease or defect would not become an issue where only evidence of mental disease or defect was statements of defense counsel that defendant did not appreciate the seriousness of the charges against him, which counsel attributed to the fact that defendant had only a third grade education and had an unspecified medical problem which required medication. *Hudson v. State*, 303 Ark. 637, 801 S.W.2d 48 (1991).

The trial court did not err in ordering the psychological examination of the defendant, because it was not unreasonable for the trial court to have anticipated that the mental condition of the defendant might become an issue in the case, where

the defendant made motions for continuance alleging that she was undergoing intensive psychological testing and evaluation. *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992), cert. denied, 507 U.S. 985, 113 S. Ct. 1582, 123 L. Ed. 2d 149 (1993).

Trial court's refusal to halt the proceedings and order a mental evaluation based on defendant's notice was proper where there was no specific assertion that appellant was suffering from a mental disease or defect which affected his competency to proceed, but rather that it was his lack of recollection of the incident that was affecting his capacity to proceed. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

When defendant filed neither a notice that he intended to rely on the defense of mental disease or defect nor a notice that he would put his fitness to proceed into issue, an order setting a case for trial without a psychiatric examination would be affirmed unless the trial court had reason to believe that mental disease or fitness might become an issue. *Hardaway v. State*, 321 Ark. 576, 906 S.W.2d 288 (1995).

Psychiatrist's Opinion.

While psychiatrist's opinion was a conditional one, it was nonetheless an opinion as to defendant's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" at the time the offense was committed. *Walker v. State*, 303 Ark. 401, 797 S.W.2d 447 (1990).

Where the report of a staff psychologist at a state hospital where the defendant was committed did not address the issue of defendant's fitness to proceed, or whether the defendant was dangerous to himself or the person or property of others, the trial court was correct in denying defendant's petition asking that the charges against him be dismissed because he would never be competent to stand trial. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

Subdivision (d)(4) of this section requires no unequivocal or conclusive opinion, but provides only that such reports contain some opinion as to the extent to which the defendant's mental capacity was impaired. *Williams v. State*, 320 Ark. 67, 894 S.W.2d 923 (1995).

Request or Motion for Examination.

A pretrial motion for a psychiatric examination was not sufficient to raise the requisite reasonable or bona fide doubt necessary for the trial judge to make a finding of the defendant's incompetency to stand trial. *Collins v. Housewright*, 664 F.2d 181 (8th Cir. 1981), cert. denied, 455 U.S. 1004, 102 S. Ct. 1639, 80 L. Ed. 2d 841 (1982).

Where no request for a pretrial examination or for such suspension was made by defendant, it was error for the trial court not to suspend proceedings for purposes of a psychiatric examination. *Davies v. State*, 286 Ark. 9, 688 S.W.2d 738 (1985).

The time necessary to complete a mental examination requested by a defendant, pursuant to this section, is excluded from the one-year period for speedy trial. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004).

Court did not err in denying a motion for an independent mental evaluation or for failing to hold a mental competency hearing where a mental evaluation had been performed on defendant at his request, a hearing to determine fitness to proceed was also held, and defendant presented no evidence to cast doubt on his fitness to proceed. *Avery v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 836 (Nov. 16, 2005).

Second Opinion.

Normally, an evaluation performed under this section does not require a second opinion. *Richmond v. State*, 320 Ark. 566, 899 S.W.2d 64 (1995).

Defendant who was not diligent in attempting to secure the necessary information on which to build a defense of mental disease or defect, was not entitled to a second opinion examination. *Dirickson v. State*, 329 Ark. 572, 953 S.W.2d 55 (1997).

Defendant's motion for a continuance so that she could obtain an independent mental evaluation was properly denied where (1) the defendant waited more than one year after the original evaluation to request a second evaluation, even though she had private counsel and had her own source of funds, and (2) there was simply no evidence offered by the defendant that she had actually suffered from a mental disease or defect or was otherwise incompetent to stand trial. *Dyer v. State*, 343 Ark. 422, 36 S.W.3d 724 (2001).

Supplementary Examination.

The trial court's denial of supplementary mental examination was within its discretion under this section. *Campbell v. Lockhart*, 789 F.2d 644 (8th Cir. 1986); *Welter v. State*, 26 Ark. App. 75, 759 S.W.2d 814 (1988).

Where the psychiatrist's report told the court virtually nothing and was palpably in noncompliance with this section and the defendant had a history of mental illness, further observation and examination as contemplated by this section should have been ordered and his conviction was reversed. *Vance v. State*, 288 Ark. 274, 704 S.W.2d 170 (1986).

Evidence sufficient to find that further examination at the state hospital, pursuant to this section was not warranted. *Walker v. State*, 303 Ark. 401, 797 S.W.2d 447 (1990).

An evaluation as was done under this section does not require a second opinion, despite defendant's request for a second evaluation. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994).

Additional psychological evaluation to address the defendant's competence to waive his Miranda rights denied where (1) he was evaluated at the Arkansas State Hospital for 30 days and found to be incompetent to assist in his defense at that time, (2) he withdrew his defense of

mental disease or defect prior to trial, thereby eliminating the question of his sanity from the issues considered at trial, and (3) the court considered expert testimony by doctors at the state hospital as part of the totality of circumstances relating to whether the custodial statement was knowingly and intelligently made. *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998).

Any further mental evaluations after the first one required by this section are discretionary with the trial court. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001).

Cited: *Mears v. Arkansas State Hosp.*, 265 Ark. 844, 581 S.W.2d 339 (1979); *Branham v. State*, 274 Ark. 109, 623 S.W.2d 1 (1981); *State v. Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988); *See v. State*, 296 Ark. 498, 757 S.W.2d 947 (1988); *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989); *Johnson v. State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989); *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990); *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990); *Gilbert v. State*, 308 Ark. 176, 823 S.W.2d 875 (1992); *Miller v. State*, 318 Ark. 673, 887 S.W.2d 280 (1994); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

5-2-306. Access to defendant by examiners of his choice.

When a defendant desires to be examined by one (1) or more qualified physicians or other experts of his or her own choice, that qualified physician or other expert is permitted to have reasonable access to the defendant for the purpose of examination.

History. Acts 1975, No. 280, § 610; A.S.A. 1947, § 41-610.

CASE NOTES**In General.**

Court did not err in denying a motion for an independent mental evaluation or for failing to hold a mental competency hearing where a mental evaluation had been performed on defendant at his re-

quest, a hearing to determine fitness to proceed was also held, and defendant presented no evidence to cast doubt on his fitness to proceed. *Avery v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 836 (Nov. 16, 2005).

5-2-307. Admissibility of statements made during examination or treatment.

Any statement made by a person during an examination or treatment is admissible as evidence only:

- (1) To the extent permitted by the Uniform Rules of Evidence; and
- (2) If the statement is constitutionally admissible.

History. Acts 1975, No. 280, § 615; **Cross References.** Uniform Rules of 1977, No. 360, § 3; A.S.A. 1947, § 41-615. Evidence, § 16-41-101.

CASE NOTES

Cited: Randleman v. State, 310 Ark. 411, 837 S.W.2d 449 (1992).

5-2-308. Expert witnesses.

(a) At any hearing concerning a defendant's responsibility or fitness to proceed, or upon trial, an examiner who reported pursuant to § 5-2-305 may be called as a witness by the prosecution, the defendant, or the court.

(b) If called by the court, the examiner called as a witness is subject to cross-examination by the prosecution and by the defendant.

(c) Both the prosecution and the defendant may summon any other qualified physician or other expert to testify.

History. Acts 1975, No. 280, § 611; **Cross References.** Testimony of mental health examiners, § 16-86-106. A.S.A. 1947, § 41-611.

5-2-309. Determination of fitness to proceed.

(a) If the defendant's fitness to proceed becomes an issue, the issue of the defendant's fitness to proceed shall be determined by the court.

(b) If neither party contests the finding of the report filed pursuant to § 5-2-305, the court may make the determination under subsection (a) of this section on the basis of the report.

(c) If the finding of the report is contested, the court shall hold a hearing on the issue of the defendant's fitness to proceed.

History. Acts 1975, No. 280, § 606; A.S.A. 1947, § 41-606.

CASE NOTES**ANALYSIS**

Constitutionality.

Appeal.

Duty to decide fitness.

Hearing.

Motions.

Post-conviction hearing.

Rebuttable presumption.

Test of competence.

Constitutionality.

The action of the trial court in resolving the question as to defendant's fitness to stand trial was proper and this section in making the issue a question of law does

not in any way violate Ark. Const., Art. 7, § 23 which requires issues of law to be determined by the court and matters of fact to be resolved by the jury. *Rogers v. State*, 264 Ark. 258, 570 S.W.2d 268 (1978).

Appeal.

On appeal, the court will affirm where there is substantial evidence to support the trial court's findings concerning a defendant's fitness to proceed. Substantial evidence is evidence of sufficient force and character to compel a conclusion of reasonable and material certainty. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989), overruled on other grounds by *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Duty to Decide Fitness.

Where, testimony of experts differed as to the defendant's capability of assisting in his defense and understanding the nature and extent of his actions, the trial court should have made a determination of defendant's mental condition and whether or not he was competent to proceed to trial. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

It was the duty of the court to make a determination of the issue of the defendant's fitness to proceed with the trial, either on the report of the Arkansas State Hospital or after a hearing on that issue; and it was reversible error for the trial judge to leave the matter to the jury to decide. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

It is the duty of the trial court to make a determination of a defendant's fitness to proceed to trial when it becomes an issue, and it is reversible error to leave the matter for the jury's determination. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980); *Robertson v. State*, 298 Ark. 131, 765 S.W.2d 936 (1989).

Where psychiatrist's report raises a reasonable doubt about defendant's competency to stand trial, the trial court should order a full examination and report pursuant to § 5-2-305(c) and, if warranted by the report, should conduct a determination of fitness to proceed pursuant to this section. *Jacobs v. State*, 294 Ark. 551, 744 S.W.2d 728 (1988).

Where the trial court's inquiry into the defendant's competency consisted of: no witnesses; the only medical report was a one paragraph letter from the mental health center; and the trial court's questioning was very limited, the hearing did not comply with due process. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991).

Where three doctors, in a collective opinion, were unable to arrive at a consensus on whether the defendant was competent, and, therefore, recommended further evaluation, there was a sufficient doubt raised about defendant's competency for trial. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991).

Trial court committed reversible error by failing to immediately suspend the proceedings in defendant's trial for first degree murder and order a psychiatric evaluation upon defendant's motion requesting that an evaluation be done. *Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002).

Hearing.

Evidence sufficient to find that there was no prejudicial error in the conduct of the competency hearing. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980).

Where there was no indication in the record that the defendant contested the competency finding, the trial court was not required to hold a hearing on the issue. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

A court must hold a hearing on fitness if the report filed under this section is contested. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

Motions.

Where defense counsel requested a psychiatric examination of the defendant, and the psychiatrist's report stated defendant was fit to stand trial, the court was not required to make further findings in the absence of a defense motion and if the defense's original request was intended as such a motion as well, it was obligated to obtain a ruling on the motion. *McClellan v. State*, 264 Ark. 223, 570 S.W.2d 278 (1978).

A pretrial motion for a psychiatric examination for a criminal defendant was not sufficient to raise the requisite reasonable or bona fide doubt necessary for the trial judge to make a finding of the defendant's incompetency to stand trial. *Collins v. Housewright*, 664 F.2d 181 (8th Cir.

1981), cert. denied, 455 U.S. 1004, 102 S. Ct. 1639, 80 L. Ed. 2d 841 (1982).

Court did not err in denying a motion for an independent mental evaluation or for failing to hold a mental competency hearing where a mental evaluation had been performed on defendant at his request, a hearing to determine fitness to proceed was also held, and defendant presented no evidence to cast doubt on his fitness to proceed. *Avery v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 836 (Nov. 16, 2005).

Post-Conviction Hearing.

The trial court arguably should have ordered a competency hearing, irrespective of the psychiatrist's report finding the defendant competent, where there was evidence which may have cast doubt on the defendant's competency to stand trial; however, any error was rectified when the trial court held the post-conviction proceeding under ARCrP 37.1, at which time the defendant received a full and fair hearing on the issue of his competency. *Campbell v. Lockhart*, 789 F.2d 644 (8th Cir. 1986).

Although trial counsel's failure to request a competency hearing where there was a substantial doubt about the petitioner's competency may have constituted

ineffective assistance of counsel, the failure of the defendant's trial counsel to pursue the issue of his competency did not violate his right to effective assistance of counsel where the defendant did receive a subsequent post-conviction hearing. *Campbell v. Lockhart*, 789 F.2d 644 (8th Cir. 1986).

Rebuttable Presumption.

There is a presumption of competence to stand trial, and the burden of proof of incompetence is on the defendant. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980).

Test of Competence.

The test of competence to stand trial is whether an accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980); *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

Amnesia or lack of memory is not an adequate ground for holding a defendant incompetent to stand trial. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

(a)(1)(A) If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Director of the Department of Health and Human Services for detention, care, and treatment until restoration of fitness to proceed.

(B) However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

(2) A copy of the report filed pursuant to § 5-2-305 shall be attached to the order of commitment or order of conditional release.

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to subsection (a) of this section, the director or his or her designee shall file with the committing court a written report indicating whether the defendant is fit to proceed, or, if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

(2)(A) The court shall make a determination within one (1) year of a commitment pursuant to subsection (a) of this section.

(B) Pursuant to the report of the director or his or her designee or as a result of a hearing on the report, if the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the director to petition for an involuntary admission.

(c)(1) On the court's own motion or upon application of the director, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed the criminal proceeding shall be resumed.

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

History. Acts 1975, No. 280, § 607; A.S.A. 1947, § 41-607; Acts 1989, No. 645, § 1; 1989, No. 911, § 1.

Publisher's Notes. Acts 1989, No. 645, § 8, provided: "It is the express intent of this act to adopt the standards for

committing insanity acquittees and the automatic commitment procedures as authorized by *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1903) and *United States v. Wallace*, 845 F.2d 1471 (8th Cir. 1988)."

CASE NOTES

ANALYSIS

Applicability.

Annual report.

Application for release.

Dismissal of charges.

Jurisdiction.

Length of detention.

Applicability.

There is nothing in this section, or §§ 5-2-301 — 5-2-309 or 5-2-311 — 5-2-316 to indicate that it should have any retroactive or retrospective effect; therefore, Subsection (b) has no application to defendant, who was committed to the state hospital until restored to reason more than three years before this section went into effect. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

This section concerns an accused who is being held on a pending charge but is "unfit to proceed," and where defendant had been acquitted of murder charge on grounds of mental disease so that there were no criminal charges pending against the defendant nor could there ever be any criminal charges brought against him for that particular offense, the section would be inapplicable; and confinement should have been ordered pursuant to the statute governing civil commitment. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980).

Annual Report.

The director of the Arkansas State Hospital has a duty under the statute to file the annual report for an accused who was committed after being found incompetent

to stand trial. *Coley v. Clinton*, 479 F. Supp. 1036 (E.D. Ark. 1979), modified on other grounds, 635 F.2d 1364 (8th Cir. 1980).

Application for Release.

Patients of the Arkansas State Hospital who were committed for a sufficient length of time under procedures for commitment of persons charged with crime clearly had a right, under the Code, to present an application for release to the committing trial court, or to contest a report by the director of the State Hospital which stated that the patient should remain hospitalized. *Coley v. Clinton*, 479 F. Supp. 1036 (E.D. Ark. 1979), modified on other grounds, 635 F.2d 1364 (8th Cir. 1980).

Dismissal of Charges.

Where the report of a staff psychologist at a state hospital where the defendant was committed did not address the issue of defendant's fitness to proceed, or whether the defendant was dangerous to himself or the person or property of others, the trial court was correct in denying

defendant's petition asking that the charges against him be dismissed because he would never be competent to stand trial. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

Jurisdiction.

Where the accused was never acquitted by the circuit court, but was found to be unable to cooperate effectively with his attorney in the preparation of his defense and proceedings against him were suspended, the circuit court never lost jurisdiction to the probate court. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

Length of Detention.

Although the defendant was in the state hospital for a period longer than the one-year period that a circuit court can commit a person who lacks fitness to proceed, commitment had a dual purpose, mental evaluation and medical recuperation, and even if the commitment violated this section, an illegal detention will not void a subsequent conviction. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

5-2-311. Lack of fitness to proceed — Motions without defendant's personal participation.

The fact that the defendant lacks fitness to proceed does not preclude through counsel and without the personal participation of the defendant any motion upon:

- (1) A ground that the:
 - (A) Indictment is insufficient;
 - (B) Statute of limitations has run; or
 - (C) Prosecution is barred by a former prosecution; or
- (2) Any other ground that the court deems susceptible of fair determination prior to trial.

History. Acts 1975, No. 280, § 608; A.S.A. 1947, § 41-608.

CASE NOTES

Cited: *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989).

5-2-312. Lack of capacity — Affirmative defense.

(a)(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked capacity as a result of mental disease or defect to:

- (A) Conform his or her conduct to the requirements of law; or

(B) Appreciate the criminality of his or her conduct.

(2) When the affirmative defense of mental disease or defect is presented to a jury, prior to deliberations the jury shall be instructed regarding the disposition of a defendant acquitted on a ground of mental disease or defect pursuant to § 5-2-314.

(b) As used in the Arkansas Criminal Code, “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) When a defendant is acquitted on a ground of mental disease or defect, the verdict and judgment shall state that the defendant was acquitted on a ground of mental disease or defect.

History. Acts 1975, No. 280, § 601; A.S.A. 1947, § 41-601; Acts 2001, No. 248, § 1.

A.C.R.C. Notes. Acts 2001, No. 248, § 2, provided: “Intent. (a)(1) It is the intent of the General Assembly that Arkansas join the majority of jurisdictions to have considered the question that juries be fully informed and understand that evidence admitted on the question of mental disease or defect may be considered by them on the question of the mental state of the accused to commit the offense charged or a lesser included offense.

“(2) It is the intent of the General Assembly to specifically abrogate Robinson v. State, 269 Ark. 90, 598 S.W.2d 421 (1980); Westbook v. State, 274 Ark. 309, 624 S.W.2d 633 (1981); and Riggs v. State, 339 Ark. 111, 3 S.W. 3d 305 (1999).

“(b) It is further the intent of the General Assembly that juries in Arkansas be fully informed and understand that a defendant acquitted by reason of his mental disease or defect will not automatically be released and whether he will ever be released depends upon what is found by the Arkansas State Hospital and the courts.

“(c)(1) The General Assembly considers that most states require juries, in cases asserting the defense of mental disease or defect, to be informed of the disposition of the defendant, so that the juries will not erroneously believe that the defendant

would immediately be released from custody should they find the defendant not guilty by reason of mental disease or defect, because it can divert juries from fairly determining that question.

“(2) Arkansas previously expressed the judicial rationale, in cases in which the defendant asserts the defense of mental disease or defect, that informing juries on matters of the disposition of offenders would divert juries from their duty to decide the facts. See, e.g., Madison v. State, 287 Ark. 179, 697 S.W.2d 106 (1985). This rationale for denying such a jury instruction was abrogated in 1993 by the General Assembly by the adoption of bifurcated sentencing in Arkansas Code 16-97-103(1) which requires that juries be instructed as to ‘the law applicable to parole, meritorious good time, or transfer’ in determining a sentence. Therefore, the rationale for not so instructing the jury having been changed by the General Assembly, juries should now be informed of the effect of their verdict in cases where this affirmative defense is raised.”

Amendments. The 2001 amendment redesignated the former (a) as present (a)(1); added (a)(2); and made minor stylistic changes.

Meaning of “Arkansas Criminal Code”. See note at § 5-1-101.

Cross References. Instruction to jury when insanity a defense, § 16-89-125.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

Recent Developments: Criminal Law: Placing Burden of Proof on Defendant to

Show Issue of Insanity Found Constitutional, 33 Ark. L. Rev. 433.

Sullivan, Psychiatric Defenses in Arkansas Criminal Trials, 48 Ark. L. Rev. 439.

UALR L.J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

In general.
 Applicability.
 Burden of proof.
 Duty of court.
 Evidence.
 Instructions.
 Judicial review.
 Mental disease or defect.
 Statements by prosecutor.
 Tests of capacity.
 Withdrawal of incompetency defense.

In General.

This section, drawn from the Model Penal Code, replaces the former test of insanity in Arkansas, which was essentially the M'Naghten test. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980).

Applicability.

This section does not apply to juveniles during the adjudication phase of a delinquency proceeding in juvenile court. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998).

Burden of Proof.

The burden was upon the defendant to prove insanity by a preponderance of the evidence. *Casat v. State*, 40 Ark. 511 (1883), overruled on other grounds by *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984); *Cavaness v. State*, 43 Ark. 331 (1884); *Coates v. State*, 50 Ark. 330, 7 S.W. 304 (1888); *Williams v. State*, 50 Ark. 511, 9 S.W. 5 (1888); *Bolling v. State*, 54 Ark. 588, 16 S.W. 658 (1891) (decisions under prior law).

The law presumes that every man is sane and that he intends the natural consequences of his acts; and where one was charged with murder in the first degree and it was admitted that if sane he was guilty as charged and the plea of insanity was interposed in his defense, the burden was on the accused to establish his insanity by a preponderance of the evidence. *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915) (decision under prior law).

The defense of mental disease or defect

is an affirmative defense which defendant must prove by a preponderance of the evidence. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982); *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

Instruction as to burden of proof by state and defendant held proper. *Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979).

The burden is upon the accused to establish that he was suffering from a mental disease or defect to the degree which would require him to be acquitted. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

It is true that the defense of not guilty by reason of insanity placed the burden of proof of such defense upon the defendant, but because the defendant is required to affirmatively prove certain defenses, it does not follow that the state is relieved of the overall burden of proving the guilt of the accused beyond a reasonable doubt. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

The burden of proof of the affirmative defense or defect is by a preponderance of the evidence, which is much less than the burden required of the state in the overall case which is that of proof beyond a reasonable doubt. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

The insane delusion instruction is not in conformity with the present law, and giving it constituted reversible error. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980).

The state is not relieved of the burden of proving beyond a reasonable doubt each element of the offense charged merely because a defendant has raised the affirmative defense of mental disease or defect under subsection (a), to this extent this section does not presuppose an admission of the act in question, and thus a defendant's privilege against self-incrimination

is not violated. *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92, cert. denied, 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

To prevail on an insanity defense, a defendant has to prove, by a preponderance of the evidence, that at the time of the events in question, "as a result of mental disease or defect," he lacked the capacity to "conform his conduct to the requirements of law or to appreciate the criminality of his conduct" under this section and § 5-1-111(d). *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

In a prosecution for capital felony murder, evidence the defendant was receiving Social Security checks for a mental disability was inadmissible to show lack of mental capacity, absent a showing that the standard for determining entitlement to such aid was the same as the statutory description of lack of capacity to engage in criminal misconduct. *Bowden v. State*, 328 Ark. 15, 940 S.W.2d 494 (1997).

A determination that an individual presents a clear and present danger to himself or others, as is required for civil commitment under § 20-47-207, is not necessarily the same as a determination that an individual lacks the capacity to form culpable intent, as is required to acquit an individual under this section. *Edwards v. State*, 328 Ark. 394, 943 S.W.2d 600 (1997), cert. denied, 522 U.S. 950, 118 S. Ct. 370, 139 L. Ed. 2d 288 (1997).

Duty of Court.

Where testimony of experts differed as to the defendant's capability of assisting in his defense and understanding the nature and extent of his actions, the trial court should have made a determination of defendant's mental condition and whether or not he was competent to proceed to trial. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

The decision of whether to direct a verdict of acquittal is discretionary with the trial court under § 5-2-313; a directed verdict of acquittal is properly denied where there are questions of fact remaining concerning the defendant's affirmative defense of insanity under this section. *Phillips v. State*, 314 Ark. 531, 863 S.W.2d 309 (1993).

Evidence.

For cases discussing the opinion testimony of nonexperts, see *Shaeffer v. State*, 61 Ark. 241, 32 S.W. 679 (1895); *Dewein v. State*, 120 Ark. 302, 179 S.W. 346 (1915); *Hankins v. State*, 133 Ark. 38, 201 S.W. 832 (1917) (preceding decisions under prior law); *Phillips v. State*, 266 Ark. 883, 587 S.W.2d 83 (Ct. App. 1979).

After the evidence was all in, an expert could be asked his opinion as to the defendant's mental condition at the time of the criminal act, assuming the existence of facts which the evidence tended to prove; however, in the exercise of its discretion, the trial court could refuse to permit a medical witness to testify where the witness stated that he had practiced medicine only a short time, had never treated a mental disease, and had only studied them as far as ordinary cases were concerned. *Green v. State*, 64 Ark. 523, 43 S.W. 973 (1898) (decision under prior law).

Confession of accused held admissible, though he pleaded insanity, for the purpose of enabling the jury to determine his mental capacity. *Ince v. State*, 77 Ark. 418, 88 S.W. 818 (1905) (decision under prior law).

Where testimony of psychiatrists for state and defense differed in their conclusions on whether the defendant's capacity, the evidence was sufficient to sustain the jury's verdict of guilty. *Stanley v. State*, 248 Ark. 787, 454 S.W.2d 72 (1970) (decision under prior law).

There was substantial evidence to support a finding by the jury that defendant was legally responsible for her acts. *Curry v. State*, 272 Ark. 291, 613 S.W.2d 829 (1981); *Robertson v. State*, 304 Ark. 332, 802 S.W.2d 920 (1991).

Upon the evidence presented, defendant failed to prove by a preponderance of the evidence that at the time of the offenses, he was suffering from a mental disease or defect to the extent that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981).

Although, in a prosecution for delivery of a controlled substance, a therapist confirmed that the defendant had been diagnosed as having posttraumatic stress syndrome and that she was treating him for this condition, the defendant failed to pro-

duce evidence to justify his proffered jury instruction on mental disease or defect. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

Evidence of moodiness, irritability, and nervousness does not go to the substance of an instruction based on subsection (a). There must be some indication from the evidence that the defendant lacks the appreciation that sane men have of what it is they are doing and of its legal and moral consequences. *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987).

Medical evidence on the issue of insanity is highly persuasive; however, a jury is not bound to accept opinion testimony of experts as conclusive, and it is not compelled to believe their testimony any more than the testimony of other witnesses. Even when several competent experts concur in their opinions, and no opposing expert evidence is offered, the jury is bound to decide the issue upon its own judgment. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863, cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 572 (1992).

Evidence sufficient to support finding that defendant was sane and had the mental capacity necessary to perform the crime. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).

While medical evidence on the issue of insanity is highly persuasive, a jury is not bound to accept opinion testimony of experts as conclusive, and it is not compelled to believe their testimony any more than the testimony of other witnesses; it is for the jury to decide whether a defendant has sustained the burden of proving insanity by a preponderance of the evidence. *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

Sufficient evidence existed for the jury to find that defendant was sane and legally responsible when he committed the crimes. *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

Defendant's motion for an order of acquittal, on the basis of expert testimony that he lacked the capacity to have the culpable mental state to commit the offense charged, was denied where the State's evidence raised questions of fact regarding the defendant's defense of insanity. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

Instructions.

The jury is not to be told the options available to the trial court when a defendant is found not guilty by mental defect or disease. *Robertson v. State*, 304 Ark. 332, 802 S.W.2d 920 (1991); *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

Judicial Review.

Supreme Court, upon reviewing the evidence as to a defense of insanity, will not attempt to determine where the preponderance of the evidence lies, but will affirm the judgment if there is substantial evidence to support the verdict. *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980).

Mental Disease or Defect.

It was no defense to a crime committed by a sane person that it was done under the influence of an irresistible impulse, or by overmastering anger, or revenge, or passion. *Casat v. State*, 40 Ark. 511 (1883); *Williams v. State*, 50 Ark. 511, 9 S.W. 5 (1888); *Bolling v. State*, 54 Ark. 588, 16 S.W. 658 (1891); *Smith v. State*, 55 Ark. 259, 18 S.W. 237 (1891) (preceding decisions under prior law).

A person who knew right from wrong could be so afflicted that he lost the power to choose and could not function as a free agent under some particular situation; and, if a person was incapable, because of idiocy or lunacy, of distinguishing between right and wrong, as to the particular act, at the time he committed it, he was not criminally responsible for the act. *Green v. State*, 64 Ark. 523, 43 S.W. 973 (1898) (decision under prior law).

Testimony showing that defendant was angered or excited when he fired the shot was not sufficient to justify the jury in finding that he was insane. *Hulsey v. State*, 111 Ark. 510, 164 S.W. 273 (1914) (decision under prior law).

Defendant's statement that "it's going to be all right I'm going to plead temporary insanity I'll get off" was evidence of calculation and even premeditation on the part of defendant and exhibited an awareness of the legal and moral consequences of his actions. *Phillips v. State*, 314 Ark. 531, 863 S.W.2d 309 (1993).

The performance of defendant's lawyers at the guilt phase of his state court murder trial was deficient on account of their failure to present evidence of his history

on anti-psychotic drugs and the likelihood that he had stopped taking them sometime within three to seven weeks before commission of the offense. *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Statements by Prosecutor.

Statement taken in full context with other statements, which meant that, even though the jurors might find the state proved beyond a reasonable doubt that defendant had the requisite mental culpability to commit a crime, they were then to determine whether he could conform his conduct to the requirements of the law, did not prejudice defendant. *Catlett v. State*, 321 Ark. 1, 900 S.W.2d 523 (1995).

Tests of Capacity.

The insanity that excused crime must have been such as to render the defendant incapable of distinguishing right from wrong, in respect to the crime committed; or, if he was conscious of the act that he was committing, and knew its consequences, that by reason of his insanity he was wrought up to a frenzy which rendered him incapable of controlling his actions. *Williams v. State*, 50 Ark. 511, 9 S.W. 5 (1888); *Scruggs v. State*, 131 Ark. 320, 198 S.W. 694 (1917) (decisions under prior law).

Whether the accused was capable of distinguishing right from wrong in the general affairs of life was not a test of his sanity. *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915) (decision under prior law).

Mental capacity to know that one's acts were in violation of the law was not one of the tests of insanity. *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915) (decision under prior law).

Where insanity was interposed as a defense, such defense could not avail un-

less it appeared from a preponderance of the evidence, first that at the time of the crime, the defendant was under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or, second, if he did not know it, that he did not know that he was doing what was wrong, or third, if he knew the nature and quality of the act and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done and unable, because of the disease, to resist the doing of the wrong act which act was the result solely of his mental disease. *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915) (decision under prior law).

This section is complete in setting out the tests to be applied in determining if a defendant is not guilty by reason of insanity which is whether or not the defendant could (1) conform his conduct to the law or (2) appreciate the criminality of his conduct. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980).

Withdrawal of Incompetency Defense.

Affirmative defenses can be withdrawn; however, the inherent nature of the mental defect defense, once asserted, requires the court to examine closely a defendant's ability to take his competency out of issue. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

Cited: *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980); *Branham v. State*, 274 Ark. 109, 623 S.W.2d 1 (1981); *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981); *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984); *Davies v. State*, 286 Ark. 9, 688 S.W.2d 738 (1985); *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986); *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001).

5-2-313. Acquittal based on mental health report.

(a) On the basis of the report filed pursuant to § 5-2-305 and after a hearing, if a hearing is requested, the court may enter judgment of acquittal on the ground of mental disease or defect if the court is satisfied that the following criteria are met:

(1) The defendant currently has the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense; and

(2) At the time of the conduct charged, the defendant lacked capacity as a result of mental disease or defect to conform his or her conduct to the requirements of law or to appreciate the criminality of his or her conduct.

(b) If the defendant did not raise the issue of mental disease or defect as an affirmative defense pursuant to § 5-2-305(a)(1)(A) or (C), then the court is required to make a factual determination that the defendant committed the offense and that he or she was suffering from a mental disease or defect at the time of the commission of the offense.

History. Acts 1975, No. 280, § 609; A.S.A. 1947, § 41-609; Acts 1989, No. 645, § 2; 1989, No. 911, § 2; 2001, No. 1554, § 4.

Publisher's Notes. Acts 1989, No. 645, § 8, provided: "It is the express intent of this act to adopt the standards for committing insanity acquittees and the automatic commitment procedures as authorized by *Jones v. United States*, 463 U. S. 354, 103 S. Ct. 3043, 77 L.Ed.2d 694

(1903) and *United States v. Wallace*, 845 F.2d 1471 (8th Cir. 1988)."

Amendments. The 2001 amendment inserted the subsection designations; added (a)(1); added "the following criteria are met" in the introductory language of (a); in (b), inserted "as an affirmative defense" and substituted "§ 5-2-305(a)(1)(A) or (C)" for "§ 5-2-305"; and made minor stylistic and gender neutral changes throughout.

RESEARCH REFERENCES

Ark. L. Rev. Sullivan, *Psychiatric Defenses in Arkansas Criminal Trials*, 48 Ark. L. Rev. 439.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Acquittal denied.
Civil commitment.
Effect of other law.
Evidence.
Factual determination.
Scope of discretion.

Acquittal Denied.

Where testimony was in decided conflict with respect to the defendant's mental capacity, the trial judge properly refused to take the issue from the jury and acquit the defendant on the ground of mental disease or defect pursuant to this section, since the section is intended to permit acquittal only in cases of extreme mental disease or defect where the lack of responsibility on the part of the defendant is clear. *Westbrook v. State*, 274 Ark. 309, 624 S.W.2d 433 (1981); *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

Denial of motion for acquittal due to mental incapacity was appropriate where evidence showed the defendant took fairly elaborate steps to hide the crime, pleaded the fifth and requested a lawyer. *Franks v. State*, 306 Ark. 75, 811 S.W.2d 301 (1991).

Where psychiatric report stated that some of defendant's multiple personalities appeared to understand the wrongfulness of the alleged behavior and thus sought to avoid apprehension, but other alter egos had no memory of the events, it did not present a "clear" determination of lack of mental capacity, and there was no error in failure to acquit. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Civil Commitment.

When the court terminated all proceedings against a defendant on grounds of

mental disease, his status was as if he had never been charged with the crime upon which those proceedings were instituted; therefore, confinement, after acquittal, should have been ordered pursuant to the statute governing civil commitment. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980).

Effect of Other Law.

Section 5-2-302 does not conflict with this section. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980).

Evidence.

Medical evidence that a defendant lacks the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law does not obligate a judge to acquit under this section if there is substantial evidence presented that would support the judge's finding that the affirmative defense of mental defect was not proved by a preponderance of the evidence. *Fields v. State*, 36 Ark. App. 179, 820 S.W.2d 467 (1991).

Where the state hospital's expert witnesses offered opinions concerning defendant's mental status that were far from being clear, and where the state offered other evidence showing defendant did not exhibit any conduct which indicated to his co-workers that he was not able to control

his behavior on the day of the shootings, court did not err in refusing to grant his motion for judgment of acquittal. *Burns v. State*, 323 Ark. 206, 913 S.W.2d 789 (1996).

Factual Determination.

It is only when the defendant does not raise the issue of mental defect that the court is required to make a factual determination that the defendant committed the offense and that he was suffering from a mental disease or defect at the time the offense was committed. *Cleveland v. Frazier*, 338 Ark. 581, 999 S.W.2d 188 (1999), cert. denied, 528 U.S. 1173, 120 S. Ct. 1201, 145 L. Ed. 2d 1104 (2000).

Scope of Discretion.

The decision of whether to direct a verdict of acquittal is discretionary with the trial court under this section; a directed verdict of acquittal is properly denied where there are questions of fact remaining concerning the defendant's affirmative defense of insanity under § 5-2-312. *Phillips v. State*, 314 Ark. 531, 863 S.W.2d 309 (1993).

Cited: *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981); *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863; *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

5-2-314. Acquittal — Examination of defendant — Hearing.

(a) When a defendant is acquitted on the ground of mental disease or defect, a circuit court is required to determine and to include the determination in the order of acquittal one (1) of the following:

(1) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect;

(2) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect;

(3) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect; or

(4) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect.

(b) If the circuit court enters a determination based on subdivision (a)(1) or (3) of this section, the circuit court shall order the defendant committed to the custody of the Director of the Department of Health and Human Services for an examination by a psychiatrist or a licensed psychologist.

(c) If the circuit court enters a determination based on subdivision (a)(2) or (4) of this section, the circuit court shall immediately discharge the defendant.

(d)(1)(A) The director shall file the psychiatric or psychological report with the probate clerk of the circuit court having venue within thirty (30) days following receipt of an order of acquittal.

(B) If before thirty (30) days the director makes application to the circuit court for an extension of time to file the psychiatric or psychological report and the circuit court finds there is good cause for the delay, the circuit court may order that additional time be allowed for the director to file the psychiatric or psychological report.

(C) A hearing shall be conducted by the circuit court and shall take place not later than ten (10) days following the filing of the psychiatric or psychological report with the circuit court.

(2) If the psychiatric or psychological report is not filed within thirty (30) days following the director's receipt of an order of acquittal or within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of habeas corpus ordering the release of the defendant under terms and conditions that are reasonable and just for the defendant and societal concerns about the safety of persons and property of others.

(e)(1) A person found not guilty on the ground of mental disease or defect of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

(2) With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.

(f)(1) A person acquitted whose mental condition is the subject of a hearing has a right to counsel.

(2)(A) If it appears to the circuit court that the person acquitted is in need of counsel, an attorney shall be appointed immediately upon filing of the original petition.

(B)(i) When an attorney is appointed by the circuit court, the circuit court shall determine the amount of the fee to be paid the

attorney appointed by the circuit court and issue an order of payment.

(ii) The amount of the fee allowed shall be based upon the time and effort of the attorney in the investigation, preparation, and representation of the client at the court hearings.

(g)(1) The quorum court of each county shall appropriate funds for the purpose of payment of the attorney's fees provided for by subsection (f) of this section.

(2) Upon presentment of a claim accompanied by an order of the circuit court fixing the fee, the claim shall be approved by the county court and paid in the same manner as other claims against the county are paid.

(h) A hearing conducted pursuant to subsection (d) of this section may be held at the Arkansas State Hospital or a designated receiving facility or program where the person acquitted is detained.

(i) When conducting any hearing set out in this section, the circuit judge may conduct the hearing within any county of his or her judicial district.

(j)(1)(A) It is the duty of the prosecuting attorney's office in the county where the petition is filed to represent the State of Arkansas at any hearing held pursuant to this section except a hearing pending at the Arkansas State Hospital in Pulaski County.

(B) A prosecuting attorney may contract with another attorney to provide services under subdivision (j)(1) of this section.

(2) The Office of the Prosecutor Coordinator shall appear for and on behalf of the State of Arkansas at the Arkansas State Hospital in Little Rock.

(3) Representation under this subsection is a part of the official duties of a prosecuting attorney or the Office of the Prosecutor Coordinator and the prosecuting attorney or the Office of the Prosecutor Coordinator is immune from civil liability in the performance of this official duty.

History. Acts 1989, No. 645, § 3; 1989, No. 821, § 1; 1989, No. 911, § 3; 1995, No. 609, § 1; 2003, No. 1185, § 3; 2005, No. 1446, § 1.

A.C.R.C. Notes. Identical Acts 1989, Nos. 645 and 911, § 3, provided, in part, that "the provisions of this section shall be in lieu of Arkansas Code § 5-2-314 and shall apply to persons who are acquitted by reason of mental disease or defect after the effective date of this act." Former § 5-2-314 derived from the following sources: Acts 1975, No. 280, § 612; 1983, No. 917, §§ 1, 3; A.S.A. 1947, §§ 41-612, 41-612.2. It was also amended by Acts 1989, No. 821, § 1; however, the enactment by identical Act Nos. 645 and 911 is deemed to be controlling. As amended by

Act No. 821, § 1, the former section read: "(a) It is the express purpose of this section to allow the probate court to commit one who has been acquitted on the ground of mental disease or defect upon a finding that the person is still affected by the mental disease or defect and presents a risk of dangerousness to himself and the person or property of others.

"(b) When a defendant is acquitted on the ground of mental disease or defect:

"(1) If the circuit court finds that the defendant is affected by mental disease or defect and that he presents a risk of danger to himself or the person or property of others, it shall order him to be committed to the custody of the Director of the State Hospital to be placed in an

appropriate institution. If within thirty (30) days after the commitment the director determines that the defendant is still affected by mental disease or defect and still presents a risk of danger to himself or the person or property of others, the director shall institute commitment proceedings in probate court in accordance with the procedures set forth in § 20-47-201 et seq., and if the probate judge determines that the defendant is still affected by the mental disease or defect and still presents a risk of danger to himself or the person or property of others, the probate judge shall commit the defendant to the appropriate facilities as provided in § 20-47-201 et seq.

"(2) If the circuit court finds that the defendant is no longer affected by mental disease or defect, it shall order him discharged;

"(3) If the circuit court finds that the defendant is affected by mental disease or defect but that he no longer presents a danger to himself or the person or property of others, it shall order him discharged from custody or released on conditions the court deems appropriate.

"(c) The circuit court's findings may be based on:

"(1) The report submitted pursuant to § 5-2-305, if uncontested; or

"(2) The medical evidence presented at trial; or

"(3) The medical evidence presented at a separate post-acquittal hearing.

"(d) Whether the circuit court's order

under subsection (b) of this section is based on the report submitted pursuant to § 5-2-305, the medical evidence presented at trial, or the medical evidence presented at a separate post-acquittal hearing, the burden shall be upon the state to prove, by a preponderance of the evidence, that the defendant should be either committed or conditionally released as provided in subsection (b) of this section."

Publisher's Notes. Cases decided prior to the 1989 repeal and reenactment of this section should be read in light of the legislative changes made by the 1989 act. See the A.C.R.C. Notes to this section for text of former statute.

Amendments. The 2003 amendment made minor stylistic changes in (a); in (d), substituted "the probate clerk of the circuit court" for "a probate court" in the first sentence and deleted "probate" preceding "court" twice in the second sentence; made a gender neutral change in (e); substituted "circuit" for "probate" in (g) and (i); in (j), deleted "in the probate court" following "held" and "before the probate judge" following "pending" in the first sentence, and deleted "before the mental health probate judge" following "State of Arkansas" in the second sentence.

The 2005 amendment added the subdivision (d)(1)(A) and (d)(1)(C) designations; substituted "receipt of an order" for "entry of order" in (d)(1)(A); and added (d)(1)(B) and (d)(2).

Cross References. Jurisdiction of circuit courts over involuntary commitments, § 20-47-205.

RESEARCH REFERENCES

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

CASE NOTES

ANALYSIS

Applicability.
Application for release.
Commitment constitutional.
Instructions.
Jurisdiction.

Applicability.

The court correctly proceeded under this section and § 5-2-315 instead of under the civil commitment statutes where

defendant was suffering from borderline intellectual functioning. *Barnett v. State*, 328 Ark. 246, 942 S.W.2d 860 (1997).

Application for Release.

Patients of the Arkansas State Hospital who were committed for a sufficient length of time under procedures for commitment of persons charged with crime clearly had a right, under the Code, to present an application for release to the

committing trial court, or to contest a report by the director of the State Hospital which stated that the patient should remain hospitalized. *Coley v. Clinton*, 479 F. Supp. 1036 (E.D. Ark. 1979), modified on other grounds, 635 F.2d 1364 (8th Cir. 1980) (decision under prior law).

Commitment Constitutional.

Confinement based on a criminal commitment pursuant to this section and § 5-2-315 does not violate Ark. Const., Art. 2, § 8 or the Fourteenth Amendment to the United States Constitution since the commitment must be based on a finding that the defendant is a danger to himself and other persons or property and is not based solely on his incompetency to stand trial. *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981) (decision under prior law).

When an accused is sufficiently linked with conduct which sustains a finding of dangerousness, his commitment by a circuit court in connection with criminal charges is based on a rational distinction from the commitment procedures followed in civil cases; accordingly, the fact that a criminal defendant committed under this section is subjected to a more lenient commitment standard, is subject to disparity in custodial care and is held to a more stringent release standard than that applied to patients committed under the civil commitment statutes, does not deny him equal protection under the Fourteenth Amendment to the United States Constitution. *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981) (decision under prior law).

Instructions.

A trial court is not required to give a requested instruction to the jury which is taken from the language of this section and explains to the jury that even after a verdict of not guilty by reason of insanity the court would still have alternative dispositions of the defendant. *Curry v. State*, 271 Ark. 913, 611 S.W.2d 745 (1981); *Dean v. State*, 272 Ark. 448, 615 S.W.2d 354 (1981); *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981) (preceding decisions under prior law).

The jury is not to be told the options available to the court when a defendant is found not guilty by reason of mental disease or defect and it is equally impermis-

sible to comment on one of the alternatives, as it would be to comment on all of them. *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981) (decision under prior law); *Robertson v. State*, 304 Ark. 332, 802 S.W.2d 920 (1991).

Trial judge was correct in refusing proffered jury instruction concerning the consequences which result when a defendant is acquitted on the grounds of mental disease or defect. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991).

Jurisdiction.

The circuit court has jurisdiction at the initial stage to make a valid commitment to the state hospital of persons found not guilty by reason of insanity or found to be incapable of assisting in their defense, but subsequent proceedings must be under the jurisdiction of probate courts. *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981) (decision under prior law).

Where it had been more than two years since the trial court dismissed the murder charge against the petitioner because of her mental disease and committed her to the State Hospital pursuant to this section, the petition was entitled to a termination of her criminal commitment, with any continued commitment to be by way of civil commitment. *Mannix v. State*, 273 Ark. 492, 621 S.W.2d 222 (1981) (decision under prior law).

Jurisdiction of the probate court in hearings where petitioner has the burden of proving that his release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect, was established by the automatic order of commitment entered by the circuit court. *Hattison v. State*, 324 Ark. 317, 920 S.W.2d 849 (1996).

While a commitment cannot be indefinite, there is no reason to deprive the probate court of jurisdiction due to a late psychiatric report. *Hattison v. State*, 324 Ark. 317, 920 S.W.2d 849 (1996).

A 6-month delay in the filing of an Act 911 (Acts 1989, No. 991) report did not cause the probate court to lose jurisdiction. *Daniels v. State*, 333 Ark. 620, 970 S.W.2d 278 (1998).

Although acquittee asserted that, because the judgment of acquittal was entered July 1, 2003, and the DHS director's

report was not filed until October 2, 2003, there was no compliance with the requirement that a report had to be filed within 30 days of acquittal, the appellate court held that, despite the untimeliness of the DHS report, it did not compromise the trial court's authority to impose continued DHS commitment. *Gibson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 50 (Jan. 19, 2005).

Where the judgment of acquittal was entered July 1, 2003, and the DHS Director's report was not filed until October 2, 2003, there was no compliance with the

requirement that a report be filed within thirty days of acquittal; however, despite the untimeliness of the DHS report, it did not compromise the trial court's authority to impose continued DHS commitment. *Gibson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 50 (Jan. 19, 2005).

Cited: *Drone v. State*, 303 Ark. 607, 798 S.W.2d 434 (1990); *Sanders v. State*, 304 Ark. 109, 798 S.W.2d 926 (1990); *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

5-2-315. Discharge or conditional release.

(a)(1)(A) When the Director of the Department of Health and Human Services or his or her designee determines that a person acquitted has recovered from his or her mental disease or defect to such an extent that his or her release or his or her conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person, the director shall promptly file an application for discharge or conditional release of the person acquitted with the circuit court that ordered the commitment.

(B) In addition, if the person acquitted has an impairment due to alcohol or substance abuse, the director may petition the circuit court for involuntary commitment under § 20-64-815.

(2) The director shall send a copy of the application to the counsel for the person acquitted and to the attorney for the state.

(b)(1) Within twenty (20) days after receiving the application for discharge or conditional release of the person acquitted, the attorney for the state may petition the circuit court for a hearing to determine whether the person acquitted should be released.

(2) If the attorney for the state does not request a hearing, the circuit court may conduct a hearing on its own motion or discharge the person acquitted.

(c) If the circuit court finds after a hearing under subsection (b) of this section by the standard specified in § 5-2-314(e) that the person acquitted has recovered from his or her mental disease or defect to such an extent that:

(1) The discharge of the person acquitted would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order that the person acquitted be immediately discharged; or

(2) The conditional release of the person acquitted under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order:

(A) That the person acquitted be conditionally released under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been:

- (i) Prepared for the person acquitted;
- (ii) Certified to the circuit court as appropriate by the director of the facility in which the person acquitted is committed; and
- (iii) Found by the circuit court to be appropriate; and

(B) As explicit conditions of release that:

(i) The person acquitted comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;

(ii) The person acquitted be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release; and

(iii) That compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order.

(d) If the circuit court determines that the person acquitted has not met his or her burden of proof under subsection (c) of this section, the person acquitted shall continue to be committed to the custody of the Department of Health and Human Services.

(e) A person ordered to be in charge of a prescribed regimen of medical, psychiatric, or psychological care or treatment of a person acquitted shall provide:

(1) The prescribed regimen of medical, psychiatric, or psychological care or treatment;

(2) Periodic written documentation to a compliance monitor of compliance with the conditions of release, including, but not limited to, documentation of compliance with the prescribed:

(A) Medication;

(B) Treatment and therapy;

(C) Substance abuse treatment; and

(D) Drug testing; and

(3)(A) Written notice of any failure of the person acquitted to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment to the:

(i) Compliance monitor;

(ii) Attorney for the person acquitted;

(iii) Attorney for the state; and

(iv) Circuit court having jurisdiction.

(B) The written notice under subdivision (e)(3)(A) of this section shall be provided immediately upon the failure of the person acquitted to comply with a condition of release.

(C)(i) Upon the written notice under subdivision (e)(3)(A) of this section or upon other probable cause to believe that the person acquitted has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person acquitted may be detained and shall be taken without unnecessary delay before the circuit court having jurisdiction over him or her.

(ii) After a hearing, the circuit court shall determine whether the person acquitted should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

(D) At any time after a hearing employing the same criteria, the circuit court may modify or eliminate the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(f)(1) Regardless of whether the director or his or her designee has filed an application pursuant to a provision of subsection (a) of this section, and at any time during the commitment of the person acquitted, a person acquitted, his or her counsel, or his or her legal guardian may file with the circuit court that ordered the commitment a motion for a hearing to determine whether the person acquitted should be discharged from the facility in which the person acquitted is committed.

(2) However, no motion under subdivision (c)(1) of this section may be filed more than one (1) time every one hundred eighty (180) days.

(3) A copy of the motion under subdivision (c)(1) of this section shall be sent to the:

(A) Director of the facility in which the person acquitted is committed; and

(B) Attorney for the state.

History. Acts 1989, No. 645, § 4; 1989, No. 911, § 4; 1995, No. 609, § 2; 1995, No. 767, § 4; 1997, No. 922, § 2.

A.C.R.C. Notes. Acts 1989, No. 645, § 4, and No. 911, § 4, provided, in part, that the “provisions of this section shall be in lieu of Arkansas Code § 5-2-315 and shall apply to persons who are acquitted by reason of mental disease or defect after the effective date of this act.” Former § 5-2-315 derived from Acts 1975, No. 280, § 613; A.S.A. 1947, § 41-613. The former section read: “(a) If the Director of the State Hospital is of the opinion that the person committed to his custody pursuant to § 5-2-314 is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a danger to himself or the person or property of others and is not in need of care, supervision, or treatment, he shall make application for the discharge or conditional release of the person in a report to the court by which the person was committed, and shall transmit a copy of the application and report to the prosecuting attorney of the judicial circuit from which the defendant

was committed. The defendant shall be given notice of such application.

“(b) A person committed pursuant to § 5-2-314 may apply to the court by which he was committed for an order of discharge or conditional release upon the ground that he is no longer affected by mental disease or defect, or if so affected, that he no longer presents a danger to himself or to the person or property of others. A copy of the application shall be transmitted to the prosecuting attorney of the judicial circuit from which the defendant was committed. An initial application for an order of discharge or conditional release may be made after the expiration of ninety (90) days from the date of the order of commitment pursuant to § 5-2-314. Subsequent applications for an order of discharge or conditional release may be made after the expiration of one (1) year from the date of disposition of the previous application.

“(c) Upon application for discharge or conditional release pursuant to subsections (a) or (b), the court may appoint one (1) or more psychiatrists to examine the

person and to submit reports to the court. Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a danger to himself or the person or property of others.

“(d) If neither the prosecuting attorney nor the defendant contests the finding of the reports filed with the court, the court may make a determination on the basis of such reports. If the findings of the reports are contested, the court shall hold a hearing on any issues presented. If the reports are received in evidence in the hearing, the court shall make available for cross-examination the reporting psychiatrist, and any party may offer other evidence on the issues presented.

“(e) If the court finds that the person is still affected by mental disease or defect and that he presents a risk of danger to himself or the person or property of others, it shall order him remanded to the custody of the Director of the State Hospital. If the court finds that the person is no longer affected by mental disease or defect it shall order him discharged from custody. If the court finds that the person is still affected by mental disease or defect, but that he is no longer a danger to himself or the person or property of others, it shall order him discharged from custody or released on such conditions as it deems appropriate.”

Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, No. 767. Subdivision (a)(2)(C) of this section was also amended by Acts 1995, No.

609, § 2, to read as follows: “(C) If, after the hearing, the court finds by the standard specified in § 5-2-314(e) that the person has recovered from his mental disease or defect to such an extent that:

“(i) His release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

“(ii) His conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, then:

“(iii) The court shall order:

“(a) That he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

“(b) As an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, and that such compliance be documented with the court at ninety-day intervals. The court, at any time, may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.”

Publisher's Notes. Cases decided prior to the 1989 repeal and reenactment of this section should be read in light of the legislative changes made by the 1989 act. See the A.C.R.C. Notes to this section for text of former statute.

CASE NOTES

ANALYSIS

Applicability.

Commitment constitutional.

Applicability.

The court correctly proceeded under this section and § 5-2-314, instead of under the civil commitment statutes where defendant was suffering from borderline intellectual functioning. *Barnett v. State*, 328 Ark. 246, 942 S.W.2d 860 (1997).

Defendant did not prove by clear and convincing evidence that he should have been released outright instead of receiv-

ing a conditional release; defendant suffered from bipolar disorder for which he had to take medicine to control, and there was evidence that defendant would stop taking his medication and again return to a natural remedy. *Bailey v. State*, 80 Ark. App. 193, 95 S.W.3d 811 (2002).

Acquittee's confinement was not solely dependent on a department of human services (DHS) determination that he was fit for release; while it was true that an acquittee could be released upon recommendation of the DHS, the acquittee himself could apply for a release pursuant to

subdivision (c)(1) of this section, and that remedy was available to the acquittee notwithstanding the fact that it was not referenced in the final disposition order. *Gibson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 50 (Jan. 19, 2005).

Commitment Constitutional.

Confinement based on a criminal commitment pursuant to § 5-2-314 and a former version of this section did not violate

Ark. Const., Art. 2, § 8 or U.S. Const. Amend. 14, since the commitment had to be based on a finding that the defendant was a danger to himself and other persons or property and was not based solely on his incompetency to stand trial. *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981) (decision under prior law).

Cited: *Owens v. Taylor*, 299 Ark. 373, 772 S.W.2d 596 (1989).

5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

(a)(1) Any person conditionally released pursuant to § 5-2-314 or § 5-2-315 may apply to the court ordering the conditional release for discharge from or modification of the order granting conditional release on the ground that he or she may be discharged or the order modified without danger to himself or herself or to the person or property of another.

(2) The application shall be accompanied by a supporting affidavit of a qualified physician.

(3) A copy of the application and affidavit shall be transmitted to the prosecuting attorney of the judicial circuit from which the person was conditionally released and to any person supervising his or her release, and the hearing on the application shall be held following notice to the prosecuting attorney and the person supervising his or her release.

(b) Within five (5) years after the order pursuant to § 5-2-314 or § 5-2-315 granting conditional release, and after notice to the conditionally released person and a hearing, if the court determines that the conditionally released person has violated a condition of release or that for the safety of the conditionally released person or for the safety of the person or property of another his or her conditional release should be revoked, the court may:

(1) Modify a condition of release; or

(2) Order the conditionally released person to be committed to the custody of the Director of the Arkansas State Hospital or another appropriate facility subject to discharge or release only in accordance with the procedure prescribed in § 5-2-315.

History. Acts 1975, No. 280, § 614; A.S.A. 1947, § 41-614; Acts 1997, No. 922, § 3.

CASE NOTES

Revocation Upheld.

Conditional release properly revoked where mentally ill appellant violated the terms of his conditional release from the state hospital by leaving the state; the trial judge was entitled to disbelieve his

uncorroborated claim that he did so involuntarily due to inadequate medication. *Manning v. State*, 76 Ark. App. 91, 61 S.W.3d 910 (2001).

Cited: *Barnett v. State*, 328 Ark. 246, 942 S.W.2d 860 (1997).

5-2-317. Jurisdiction and venue.

(a) A circuit court has exclusive jurisdiction over a person acquitted by reason of mental disease or defect and committed to the custody of the Director of the Department of Health and Human Services pursuant to § 5-2-314(b).

(b) Venue is determined as follows:

(1) For a person committed to the custody of the Department of Health and Human Services pursuant to § 5-2-314(b) and who has been committed to the Arkansas State Hospital for examination, then venue may be in Pulaski County for the initial hearing pursuant to § 5-2-314 and for a conditional release hearing pursuant to § 5-2-315; and

(2) For a person who has been conditionally released pursuant to § 5-2-315, then venue for any hearing seeking the modification, revocation, or dismissal of a conditional release order is in the county where the person currently resides.

History. Acts 1995, No. 609, § 3; 2003, No. 1185, § 4; 2005, No. 1845, § 1.

Amendments. The 2003 amendment substituted “circuit” for “probate” in (a); substituted “Pulaski County” for “the Pulaski County Probate Court, Ninth Division” in (b)(1); deleted “the probate court of” preceding “the county” in (b)(2); and deleted “in the probate court” following “presence” in (b)(3).

The 2005 amendment deleted former (b)(3).

5-2-318 — 5-2-324. [Reserved.]

5-2-325. [Repealed.]

Publisher’s Notes. This section, concerning the civil commitment at expiration of maximum term, was repealed by Acts 1989, No. 911, § 7. The section was derived from Acts 1983, No. 917, § 2; A.S.A. 1947, § 41-612.1.

SUBCHAPTER 4 — PARTIES TO OFFENSES

SECTION.	SECTION.
5-2-401. Criminal liability generally.	5-2-405. Claims that are not defenses to liability for another.
5-2-402. Liability for conduct of another generally.	5-2-406. Multiple convictions — Different degrees.
5-2-403. Accomplices.	
5-2-404. Defenses.	

Publisher’s Notes. For Comments regarding the Criminal Code, see Commentaries Volume B. Venue of prosecutions against accessories, § 16-88-114.

Cross References. Conviction on testimony of accomplice, § 16-89-111.

RESEARCH REFERENCES

ALR. Test of criminal responsibility: state cases. 9 ALR 4th 526.

Acquittal of principal or his conviction of lesser degree of offense as affecting prosecution of accessory and aider and abettor. 9 ALR 4th 972.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 204 et seq.

Ark. L. Rev. The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

C.J.S. 22 C.J.S., Crim. L., § 79 et seq.

CASE NOTES

ANALYSIS

In general.
Accessories.

In General.

The law no longer distinguishes between an accessory and the principal. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980).

Accessories.

An accessory before the fact is now referred to as an accomplice, defined in § 5-2-403, and one who was formerly an accessory after the fact is now guilty of the separate crime of hindering apprehension and prosecution under § 5-54-105. *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

5-2-401. Criminal liability generally.

A person may commit an offense either by his or her own conduct or that of another person.

History. Acts 1975, No. 280, § 301; A.S.A. 1947, § 41-301.

CASE NOTES

ANALYSIS

Evidence.
Instructions.
Participation.

Evidence.

Concerted action to commit an unlawful act may be shown by circumstantial evidence without direct proof of a conspiracy by prior agreement; hence, defendant could properly be found guilty of an offense not only by her own conduct but also by that of her accomplices. *King v. State*, 271 Ark. 417, 609 S.W.2d 32 (1980).

Instructions.

Jury instruction taken almost verbatim from this section was correct despite mention of "accomplices" where both defendants were principals inasmuch as, when two or more persons assist one another in the commission of an offense, each is an accomplice and is criminally liable for the

conduct of both. *Andrews v. State*, 262 Ark. 190, 555 S.W.2d 224 (1977).

Participation.

When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979).

Each participant in a crime is liable for his own conduct but cannot disclaim responsibility for all of the conduct in a particular episode because he did not personally take part in every act which it took to accomplish the crime. *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979), cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Cited: *Long v. State*, 260 Ark. 417, 542 S.W.2d 742 (1976); *Ward v. State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982); *Fisher v. State*, 7 Ark. App. 1, 643 S.W.2d 571 (1982).

5-2-402. Liability for conduct of another generally.

A person is criminally liable for the conduct of another person if:

- (1) The person is made criminally liable for the conduct of another person by the statute defining the offense;
- (2) The person is an accomplice of another person in the commission of an offense; or
- (3) Acting with a culpable mental state sufficient for the commission of the offense, the person causes another person to engage in conduct that would constitute an offense but for a defense available to the other person.

History. Acts 1975, No. 280, § 302;
A.S.A. 1947, § 41-302.

CASE NOTES

ANALYSIS

Accomplices.
Enhancement of punishment.
Employment relationship.
Evidence.
Innocent agents.
Instructions.
Venue.

Accomplices.

Accessory could be tried and punished as a principal. *Fanning v. State*, — Ark. —, 136 S.W.2d 1040 (1940); *Fleeman v. State*, 204 Ark. 772, 165 S.W.2d 62 (1942); *Warford v. State*, 214 Ark. 423, 216 S.W.2d 781 (1949); *Lauderdale v. State*, 233 Ark. 96, 343 S.W.2d 422 (1961); *Ballew v. State*, 246 Ark. 1191, 441 S.W.2d 453 (1969); *Murrah v. State*, 253 Ark. 432, 486 S.W.2d 897 (1972), overruled on other grounds by *Waters v. State*, 271 Ark. 33, 607 S.W.2d 336 (1980) (preceding decisions under prior law).

One who stood by, aided and abetted, could be tried as a principal regardless of what happened in cases against his alleged accomplices. *Rush v. State*, 239 Ark. 878, 395 S.W.2d 3 (1965) (decision under prior law).

One need not actually take an active part in an offense to be convicted of that charge, and where the defendant accompanied those who actually committed the offense, supplied them with a means of committing the offense, and was aware of the likelihood of some harm occurring, she brought herself within the terms of this section and § 5-4-403, she was properly

convicted. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

There is no distinction between the criminal responsibility of an accomplice and the person who actually commits the offense. *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

One who aids or assists in the commission of a crime is as guilty as the actual perpetrator of the deed; the distinction between a principal and an accessory has been abolished. *Smith v. State*, 271 Ark. 671, 609 S.W.2d 922 (1981).

Defendant was an active participant in the transaction, and as an accomplice he was liable for the criminal conduct of the other participants; therefore, he was properly charged and convicted as a principal. *Yent v. State*, 9 Ark. App. 356, 660 S.W.2d 178 (1983).

A co-conspirator may also be an accomplice. *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

Evidence was sufficient to support a conviction for capital murder based on accomplice liability where it was shown that defendant was involved in the planning of the murder, that he helped the killer set up his alibi, and that he selected the grave site and helped dig the grave where the victim's body was to be buried. *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002).

Defendant had the burden of proving that a witness was an accomplice whose testimony had to be corroborated, since mere presence at the crime scene or failure to inform law enforcement officers of a

crime did not make the witness an accomplice as a matter of law. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002).

Enhancement of Punishment.

Enhancement of defendant's punishment on the basis of his companion's actions during the commission of an offense was proper, since under a former statute an accomplice was as guilty as his confederate and subject to the same punishment. *Gammel v. State*, 259 Ark. 96, 531 S.W.2d 474 (1976) (decision under prior law).

Employment Relationship.

Employer's civil liability upheld where an employee killed his employer's neighbor when the neighbor pointed a gun at the employer; the employer was an accomplice to that manslaughter. *Costner v. Adams*, 82 Ark. App. 148, 121 S.W.3d 164 (2003).

Evidence.

Concerted action to commit an unlawful act may be shown by circumstantial evidence, without direct proof of a conspiracy by prior agreement. *King v. State*, 271 Ark. 417, 609 S.W.2d 32 (1980).

Evidence sufficient to support defendant's conviction for crime performed by another. *Smith v. State*, 271 Ark. 671, 609 S.W.2d 922 (1981); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied, 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983); *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987); *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

Evidence in the form of testimony of a mother and her daughter and son, both of whom were under the age of 14, that defendant, who was husband and father to the victims, sexually assaulted the daughter by inserting his finger into the daughter's vagina and forcing the daughter to perform oral sex on defendant, forcing the son and daughter to have sexual intercourse, and forcing the son to have intercourse with the mother, along with medical evidence of injuries to the daughter consistent with sexual assault, supported defendant's conviction for rape and three counts of accomplice to rape under the law of parties. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

There was sufficient evidence to support

a conviction for manufacturing methamphetamine based on accomplice liability where the evidence showed that drug manufacturing was taking place on defendant's property, defendant admitted knowledge of the operation, and a co-defendant also testified regarding defendant's knowledge of the operation. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

Evidence was sufficient to sustain a conviction for attempted capital murder where there was substantial evidence that defendant was not merely engaged in the "act of driving"; the victim, a police officer, testified that the driver attempted to run him over, he observed a flash from the passenger side window, he realized that he had heard a gunshot, and an officer identified defendant as the driver of the vehicle. *Clark v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 516 (Sept. 23, 2004).

Evidence was sufficient to sustain defendant's aggravated robbery conviction where defendant admitted to being in the vehicle when the crimes occurred, the evidence showed that he was the driver, defendant waited while an accomplice fired shots at the van's driver, and defendant retrieved the bank bag. *Jefferson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 726 (Nov. 18, 2004).

Innocent Agents.

One is no less guilty of the commission of a crime because he uses the overt conduct of an innocent agent. *Parnell v. State*, 323 Ark. 34, 912 S.W.2d 422 (1996).

Defendant properly held guilty of rape for forcing his adopted children to engage in sexual relations, even though the two children themselves were not guilty of that crime. *Parnell v. State*, 323 Ark. 34, 912 S.W.2d 422 (1996).

Instructions.

For cases discussing jury instructions concerning an accessory's liability, see *Burnett v. State*, 80 Ark. 225, 96 S.W. 1007 (1906); *Witherspoon v. State*, 179 Ark. 647, 17 S.W.2d 307 (1929); *Simmons v. State*, 184 Ark. 373, 42 S.W.2d 549 (1931); *London v. State*, 204 Ark. 767, 164 S.W.2d 988 (1942); *Fleeman v. State*, 204 Ark. 772, 165 S.W.2d 62 (1942); *Fitzhugh v. State*, 207 Ark. 117, 179 S.W.2d 173 (1944); *Roberts v. State*, 254 Ark. 39, 491

S.W.2d 390 (1973); *Parker v. State*, 258 Ark. 880, 529 S.W.2d 860 (1975) (preceding decisions under prior law).

Venue.

Action against accessory for acts in another county was properly brought in county where theft occurred as the acts of the accessory were the same as the principal. *State v. Reeves*, 246 Ark. 1187, 442 S.W.2d 229 (1969) (decision under prior law).

Cited: *Estate of Sargent v. Benton State Bank*, 279 Ark. 402, 652 S.W.2d 10 (1983); *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Heffernan v. Lockhart*, 834 F.2d 1431 (8th Cir. 1987); *Wilford v. State*, 300 Ark. 185, 777 S.W.2d 855 (1989); *Wilson v. State*, 301 Ark. 342, 783 S.W.2d 852 (1990); *Clements v. State*, 303 Ark. 319, 796 S.W.2d 839 (1990); *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

5-2-403. Accomplices.

(a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:

- (1) Solicits, advises, encourages, or coerces the other person to commit the offense;
- (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or
- (3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.

(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

- (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;
- (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or
- (3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

History. Acts 1975, No. 280, § 303; A.S.A. 1947, § 41-303.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

CASE NOTES

ANALYSIS

In general.
Accessories.
Burden of proof.
Buyer of illicit drugs.
Culpable activities.

Duress.
Employment relationship.
Evidence.
Grant of immunity.
Hindering apprehension and prosecution.
Information.

Instructions.

Intent.

Liability.

Question of law or fact.

In General.

There is no distinction between the criminal liability of an accomplice and the person who actually commits the offense. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994).

Subsection (a) applies in the felony-murder context when an accomplice has the purpose of promoting or facilitating the underlying felony that results in death, whereas subsection (b) applies when the issue is whether the accomplice intended the results of his actions with criminal culpability, that is, intended the death itself. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999).

Accessories.

The former distinction between principals and accessories was abolished. *Fleeman v. State*, 204 Ark. 772, 165 S.W.2d 62 (1942); *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948); *Trotter v. State*, 237 Ark. 820, 377 S.W.2d 14, cert. denied, 379 U.S. 890, 85 S. Ct. 163, 13 L. Ed. 2d 94 (1964); *Ballew v. State*, 246 Ark. 1191, 441 S.W.2d 453 (1969); *Miller v. State*, 253 Ark. 1060, 490 S.W.2d 445 (1973) (preceding decisions under prior law).

An accessory before the fact is an accomplice. *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 323 (1979).

The present criminal code treats the concept of accessories differently from the common law and is consistent with the weight of authority. Under present law an accessory before the fact is an accomplice, and one who was formerly an accessory after the fact is now guilty of a separate crime, i.e., hindering apprehension and prosecution. *Ritchie v. State*, 31 Ark. App. 177, 790 S.W.2d 919 (1990).

An accessory before the fact is now referred to as an accomplice, and one who was formerly an accessory after the fact is now guilty of a separate crime under § 5-54-105 — hindering apprehension and prosecution. *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

Trial court properly terminated the parental rights of the mother and father under § 9-27-341 and found that each

parent, either as the offender or as the accomplice, had committed a felony battery against a grandson of the mother because the mother's story that she was not involved was implausible considering the medical testimony; termination was in the child's best interests under § 9-27-341(b)(3)(A)(i) and (ii) given that the child was a dependent-neglected child under § 9-27-303(15)(A) and one purpose of § 9-27-302(2)(B) was to protect a juvenile's safety. *Todd v. Ark. Dep't of Human Servs.*, 85 Ark. App. 174, 151 S.W.3d 315 (2004).

Burden of Proof.

A person must first be found to be an accomplice under this section for the requirement of corroborative evidence to come into play under § 16-89-111(e)(1); it is the burden of the defendant to prove that a witness is an accomplice whose testimony must be corroborated. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995).

Buyer of Illicit Drugs.

A buyer of illicit drugs is not an accomplice of the seller. *Talley v. State*, 312 Ark. 271, 849 S.W.2d 493 (1993).

Culpable Activities.

Where persons combined to do an unlawful thing, if the act of one proceeding according to the common plan terminated in a criminal result, even though not the particular result intended, all were liable. *Carr v. State*, 43 Ark. 99 (1884); *Dorsey v. State*, 219 Ark. 101, 240 S.W.2d 30, cert. denied, 342 U.S. 851, 72 S. Ct. 80, 95 L. Ed. 639 (1951) (preceding decisions under prior law).

All who procured, participated in, or assented to the commission of a misdemeanor, were punishable as principals. *Foster v. State*, 45 Ark. 361 (1885); *Fortenbury v. State*, 47 Ark. 188, 1 S.W. 58 (1886); *Crocker v. State*, 49 Ark. 60, 4 S.W. 197 (1887). See also *Miller v. State*, 55 Ark. 188, 17 S.W. 719 (1891) (preceding decisions under prior law).

One who was present and aiding and abetting in the commission of a crime could be indicted for that crime, though he did not do the act necessary to commit the crime, nor attempt to do so. *Hunter v. State*, 104 Ark. 245, 149 S.W. 99 (1912) (decision under prior law).

One who counseled and procured the commission of an offense though absent at

time act was committed, could be charged in the indictment with doing the act. *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948) (decision under prior law).

A defendant could be convicted of being an accessory before the fact for involuntary manslaughter, if he sat in a car and allowed the driver to drive the car in a drunken and reckless manner, which resulted in death to another individual. *Lewis v. State*, 220 Ark. 914, 251 S.W.2d 490 (1952) (decision under prior law).

All of the participants in a crime which resulted in a second crime were equally guilty of the second crime. *Stewart v. State*, 257 Ark. 753, 519 S.W.2d 733, cert. denied, 423 U.S. 859, 96 S. Ct. 113, 46 L. Ed. 2d 86 (1975) (decision under prior law).

Where there was substantial evidence to show that the defendant not only stood by, but aided, abetted and assisted in the commission of an offense, he could not defend on the ground that he was a mere bystander. *Fant v. State*, 258 Ark. 1015, 530 S.W.2d 364 (1975) (decision under prior law).

Where the defendant accompanied those who actually committed the offense, supplied them with an instrument used to commit the offense, and aware of the likelihood of the commission of a crime, she brought herself within the terms of § 5-2-402 and this section, she was properly convicted. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

Defendant who helped others commit a crime was not an accomplice to crime where he had no knowledge that the activities constituted a crime. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

Defendant's conduct in helping to plan crime and disposing of incriminating evidence made her an accomplice as a matter of law under this section. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981).

This section does not contemplate that a person is an accomplice only if he is present at the scene of the crime; no such construction can be placed on the statute's plain language; therefore, a defendant is not precluded from being charged as an accomplice to crime merely because she was not present when the crime took place. *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982).

Where the evidence at most indicated

that the witness may have had reason to suspect that the defendants were up to no good, the evidence was not sufficient to establish that the witness should be held to be an accomplice, since suspicion alone is not enough to make a witness an accomplice as a matter of law. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

A person need not take an active part in an offense to be convicted of such if the person accompanied the person or persons who actually committed the offense and assisted in such commission. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

One who merely introduces a buyer to a seller cannot be convicted of delivery of the article to be sold, or of possession with intent to deliver; however, where the defendant was an active participant in the transaction, he was an accomplice and was liable for the criminal conduct of the other participants. *Yent v. State*, 9 Ark. App. 356, 660 S.W.2d 178 (1983).

The term "accomplice" does not embrace one who had guilty knowledge or who is morally delinquent; mere presence, acquiescence, silence or knowledge that a crime is being committed, in the absence of some legal duty to act, concealment or knowledge or failure to inform officers of the law, is not sufficient to make an accomplice. *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984).

Presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant factors in determining the connection of an accomplice with the crime. *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987); *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

Mere presence, acquiescence, silence, or knowledge that crime is being committed, in absence of legal duty to act, or failure to inform officers of law is not sufficient to make one an accomplice. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

Mere presence at the scene of the crime or failure to inform law enforcement officers of a crime does not make one an accomplice as a matter of law. *Pilcher v.*

State, 303 Ark. 335, 796 S.W.2d 845 (1990).

A defendant can be an accomplice to murder even though the defendant's participation in the murder is, compared to that of the principal, relatively passive. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

No accomplice criminal responsibility results from supplying an intoxicant to one allegedly responsible as a principal for violations of § 5-10-104(a)(1), § 5-13-204(a), or § 27-53-101(a)(1). *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

A person need not take an active part in an offense to be convicted in violation of this section if the person accompanied the person or persons who actually committed the offense and assisted in such commission. *Gibson v. State*, 316 Ark. 705, 875 S.W.2d 58 (1994).

Given defendant's presence and his willingness to make change and comment on the quality of the drugs being purchased, it is apparent he was aiding or attempting to aid in the consummation of the sales; the evidence thus was sufficient to show he was an accomplice. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994).

Stolen goods recovered from a dwelling shared by an accomplice is not sufficient corroboration standing alone of accomplice liability; however, possession of stolen property by the accused is a proper circumstance to consider in determining whether there was evidence tending to connect him with the crimes of burglary and grand larceny; the presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant facts in determining the connection of an accomplice with the crime; a person's flight to avoid arrest may be considered as corroboration of evidence tending to establish his guilt. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

Relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in proximity of the crime, the opportunity to commit the crime, and an association with a person involved in the crime in a manner suggestive of joint participation. *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996).

Where more than one weapon was fired

and the State presented evidence by which the jury could conclude that defendant aided in the commission of the murder and battery, the defendant's culpability was not affected by which bullets actually killed one victim and wounded another. *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996).

Defendant, as an accomplice to arson, did not have to have a "conscious object" to commit arson. *Reed v. State*, 326 Ark. 27, 929 S.W.2d 703 (1996).

Even though "mere presence" does not make one an accomplice, there can be enough presence to constitute probable cause to arrest. *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997).

Under principles of accomplice liability, defendant's culpability was not diminished by the fact that the accomplice was not also in possession of a weapon. *Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997).

Duress.

The trial court did not err by refusing to declare witness an accomplice as a matter of law; the evidence was such that it was appropriate for the jury to decide whether his participation was under duress under § 5-2-208 and thus that it was not his purpose to aid in the commission of the crime. *Cole v. State*, 323 Ark. 8, 913 S.W.2d 255 (1996).

Employment Relationship.

Where an employee killed his employer's neighbor when the neighbor pointed a gun at the employer, the employee was liable for manslaughter and his employer was an accomplice to that manslaughter. *Costner v. Adams*, 82 Ark. App. 148, 121 S.W.3d 164 (2003).

Evidence.

The fact that a witness was suspected, arrested and bound over to await the action of the grand jury did not show that she was an accomplice in the commission of the crime where she was never indicted for the offense and there was nothing in the evidence to warrant an indictment against her. *Rogers v. State*, 136 Ark. 161, 206 S.W. 152 (1918) (decision under prior law).

Evidence sufficient to support conviction of accessory. *Warford v. State*, 214 Ark. 423, 216 S.W.2d 781 (1949); *Kurck v. State*, 242 Ark. 742, 415 S.W.2d 61 (1967)

(preceding decisions under prior law); *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987); *Cassell v. Lockhart*, 886 F.2d 178 (8th Cir. 1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1164, 107 L. Ed. 2d 1067 (1990); *Hooks v. State*, 303 Ark. 236, 795 S.W.2d 56 (1990); *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

Evidence was sufficient to prove intent requisite for conviction. *Murrah v. State*, 253 Ark. 432, 486 S.W.2d 897 (1972), overruled on other grounds by *Waters v. State*, 271 Ark. 33, 607 S.W.2d 336 (1980) (decision under prior law).

Question as to whether the defendant was an accomplice was properly submitted to the jury. *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977); *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990).

Evidence was sufficient to support conviction as accomplice on one count but not for the other since there was no evidence showing that he was aware that a crime was being committed. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

Concerted action to commit an unlawful act may be shown by circumstantial evidence, without direct proof of a conspiracy by prior agreement; hence, defendant could properly be found guilty of offense not only by her own conduct but also by that of her two accomplices. *King v. State*, 271 Ark. 417, 609 S.W.2d 32 (1980).

There was sufficient evidence to support conviction. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998).

Where evidence concerning the defendant showed only that he was present at the scene of crime and that he had on previous occasions heard his brother discuss his intentions to commit crime, the trial court's finding that the defendant knowingly participated in the crime was clearly against the preponderance of the evidence. *Estate of Sargent v. Benton State Bank*, 279 Ark. 402, 652 S.W.2d 10 (1983).

Defendant has burden of proving witness is an accomplice whose testimony must be corroborated. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988);

Pilcher v. State, 303 Ark. 335, 796 S.W.2d 845 (1990); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

Defendant's presence at the crime scene and knowledge of the crime was shown, but such was insufficient to make him an accomplice. *Nelson v. State*, 306 Ark. 456, 816 S.W.2d 159 (1991).

Evidence held sufficient to sustain a conviction for first degree murder based on accomplice liability. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994); *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001).

Evidence of shooting held sufficient to support first degree murder conviction. *Robinson v. State*, 318 Ark. 33, 883 S.W.2d 469 (1994).

Where defendant's incriminating statement allegedly was uttered after a shooting murder occurred, it was not "in furtherance" of a crime, and was admissible because it tended to show the effect on the listener, i.e., instigating defendant's immediate response showing his approval of the shooting and tending to prove defendant's status as an accomplice. *Cole v. State*, 323 Ark. 8, 913 S.W.2d 255 (1996).

Evidence held sufficient to establish the joint nature of appellant's activities with the co-defendants. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

Where witness lured murder victim to the murder site, but there was no evidence that witness had knowledge of the crime that was going to occur, the facts did not show conclusively that witness was an accomplice as a matter of law. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996).

Evidence sufficient to support conviction for capital murder based on accomplice liability. *Allen v. State*, 324 Ark. 1, 918 S.W.2d 699 (1996).

Evidence determining defendant's liability for crime as an accomplice need only be sufficient to show he encouraged or aided in the commission of the crime. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996).

Evidence of first-degree murder held sufficient where an accomplice carried a .38-caliber handgun on the night of the murder, and expert testimony indicated that the bullets recovered from the victim were fired from such a weapon. *Matthews v. State*, 56 Ark. App. 141, 940 S.W.2d 498 (1997).

The evidence was sufficient to show that defendant possessed the requisite knowledge and intent and was an accomplice in three murders. *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997).

Evidence was insufficient to establish the defendant's accomplice liability for delivery of a counterfeit substance where a police officer testified that (1) he was working undercover with two other individuals, purchasing illegal drugs, and they drove up to defendant, who was standing on a street corner, and asked if he had a twenty-dollar rock of cocaine that he would sell to them, (2) the defendant answered, "No" and then looked over to three individuals seated on a park bench and asked if they had any drugs to sell, (3) one of those individuals stood up, approached the car and handed the officer three wrapped rocks of what appeared to be rock cocaine, and (4) when the officer returned to the police station and unwrapped the rocks, he found they were only gravel. *Heard v. State*, 71 Ark. App. 377, 32 S.W.3d 30 (2000).

In a murder prosecution, the defendant was not entitled to a directed verdict on the basis that the only witness against him was an accomplice to the crime and that his testimony was not corroborated by additional evidence as there was no uncontroverted evidence that the witness aided, agreed to aid, or attempted to aid in planning or engaging in the conduct that resulted in the victim's death, the witness had no legal duty to prevent the defendant's conduct which resulted in the victim's death, and, therefore, the trial court properly submitted the issue to the jury. *Raynor v. State*, 343 Ark. 575, 36 S.W.3d 315 (2001).

In accord with *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994). See *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001).

Defendant could not be convicted of being an accomplice to the manufacture of methamphetamine, based on her possession and sale of some of its ingredients, when there was no evidence that methamphetamine had been manufactured. *Ford v. State*, 75 Ark. App. 126, 55 S.W.3d 315 (2001).

Evidence was sufficient to support a conviction for capital murder based on accomplice liability where it was shown that defendant was involved in the planning of the murder, that he helped the

killer set up his alibi, and that he selected the grave site and helped dig the grave where the victim's body was to be buried. *Davis v. State*, 350 Ark. 22, 84 S.W.3d 427 (2002).

There was sufficient evidence to support a conviction for manufacturing methamphetamine based on accomplice liability where the evidence showed that drug manufacturing was taking place on defendant's property, defendant admitted knowledge of the operation, and a co-defendant also testified regarding defendant's knowledge of the operation. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

Co-defendant was properly convicted as an accomplice to the offenses of robbery and kidnapping where the victim testified that two people were present during the beating and a city marshal testified that he saw co-defendant at the scene of the crime. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

There was sufficient evidence to support the verdict finding the first defendant guilty of first-degree murder where (1) the first defendant gave two recorded statements in which she admitted to being at the crime scene, (2) in one of her statements, the first defendant told the police that she intended to kill the victim but was unable to muster the strength and that she handed the murder weapon to the second defendant after he stated that he would kill the victim, thus, confessing to either murdering or aiding in the murder of the victim, and (3) the victim died as a result of a homicide. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Although defendant claimed there was no proof of his actual participation or knowledge of the plan to commit the crimes such that accomplice liability should not have attached, the court ruled that, because of his presence when the crimes occurred, along with witness testimony that a man matching his description was in the area shortly after the approximate time of the crimes, the issue was for the jury to consider. *Jefferson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 416 (June 2, 2004).

Evidence was sufficient to sustain a conviction for attempted capital murder where there was substantial evidence that defendant was not merely engaged in the

“act of driving”; the victim, a police officer, testified that the driver attempted to run him over, he observed a flash from the passenger side window, he realized that he had heard a gunshot, and an officer identified defendant as the driver of the vehicle. *Clark v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 516 (Sept. 23, 2004).

Although the state conceded that it was the principal, and not defendant, who fired the fatal shot, evidence was sufficient to prove that defendant had the purpose of promoting or facilitating the commission of the offense and that he aided, agreed to aid, or attempted to aid the principal in the commission of the murder. *Woods v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 499 (Sept. 22, 2005).

Court did not err in denying defendant's motions for a directed verdict because defendant's silence, knowledge, concealment, and failure to inform law enforcement officers of the sexual assaults committed against her daughter by two men who had resided with defendant made her an accomplice to those assaults under subdivision (a)(1) of this section; there was no doubt that defendant was aware that the men were raping her daughter at various times when the girl was between eight or nine and 15 years of age. *Hutcherson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 608 (Sept. 14, 2005).

Grant of Immunity.

A grant of immunity alone does not cause a witness to be an accomplice as a matter of law. *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990).

Hindering Apprehension and Prosecution.

Hindering apprehension or prosecution is not a lesser included offense of the offense of being an accomplice. *Ritchie v. State*, 31 Ark. App. 177, 790 S.W.2d 919 (1990).

Information.

Trial court had not erred when it allowed the State to go forward with an accomplice theory even though the information failed to allege such where the information in fact named the offense and the party to be charged, it contained the elements of the offense intended to be

charged and it apprised appellant of what he had to be prepared to meet. *Polk v. State*, 82 Ark. App. 210, 105 S.W.3d 797 (2003).

Instructions.

In prosecution for manslaughter instruction that unless jury believed that defendant was driving the truck at the time of the collision which resulted in death, defendant should be acquitted was properly refused. *Fitzhugh v. State*, 207 Ark. 117, 179 S.W.2d 173 (1944) (decision under prior law).

Jury instruction that, if defendant was found to have aided, abetted or assisted in the perpetration of the crime, his punishment was to be assessed as if he were a principal was erroneous as it equated guilt with punishment. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

Evidence insufficient to find that defendant was entitled to an instruction that witnesses were accomplices as a matter of law; however, their status as accomplices was in dispute and the court should have given instructions on accomplices. *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984).

There was no abuse of discretion in the trial court's refusal to give an accomplice instruction, where the alleged accomplice testified that she was at work during the time of the break-in, there was no testimony contradicting this, and she denied that she knew anything about the burglary and theft before the fact, but she lied to the police initially. *Hopes v. State*, 306 Ark. 492, 816 S.W.2d 167 (1991).

Instruction that a person is criminally responsible for the conduct of another person when he is an accomplice in the commission of an offense and stating that an accomplice is one who directly participates in the commission of an offense or who with the purpose of promoting or facilitating the commission of an offense agrees to aid, aids, or attempts to aid the other person or persons in the planning or committing the offense was consistent with Arkansas Model Criminal Instruction 401 and this section. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

According to the evidence presented at trial, there was a plan between defendant and the accomplice to kill a drug dealer

during the drug transaction, defendant admitted to driving the truck to a remote location, there was also some evidence that defendant was in a scheme to murder the victim for a fee, defendant lied about the victim's whereabouts, and defendant fled from the scene; thus, there was ample evidence to rationally support the giving of an instruction on the lesser-included offense of first-degree murder. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Intent.

Defendant, as an accomplice to arson, did not have to have a "conscious object" to commit arson. *Reed v. State*, 326 Ark. 27, 929 S.W.2d 703 (1996).

Liability.

One need not actually take an active part in an offense to be convicted of that charge. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979).

Each participant in a crime is liable for his own conduct but he cannot disclaim responsibility for all of the conduct in a particular episode because he did not personally take part in every act which it took to accomplish the crime. *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979), cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981); *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

There is no distinction between the criminal responsibility of an accomplice and the person who actually commits the offense. *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

An accomplice's liability does not attach until the state proves that the substantive crime was completed; therefore, where defendant was charged as an accomplice to an offense, he could only be convicted if the state proved the crime was committed. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

When two or more persons assist one another in the commission of a crime, each is an accomplice and is criminally liable

for the conduct of both, and a participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990).

Although defendant never actually possessed the gun, he was liable as an accomplice because he assisted and actively participated in the crime. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991).

As the proof at trial was amply sufficient in illustrating the joint nature of defendant's and co-defendant's activities, the fact that the co-defendant's shots may have actually inflicted the victim's fatal injuries and a bystander's leg wounds was irrelevant to the question of defendant's criminal liability for the offenses. *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

So long as a defendant renders the requisite aid or encouragement to the principal with regard to the offense at issue, the defendant is an accomplice even though the defendant may have rendered the encouragement or aid reluctantly. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

Question of Law or Fact.

Whether a witness was an accomplice to an alleged crime was generally a question of fact for the jury; if the facts were in dispute, it was a mixed question of law and fact. *Rogers v. State*, 136 Ark. 161, 206 S.W. 152 (1918) (decision under prior law).

It was error to refuse to submit to the jury the question of whether or not the state's witnesses were accomplices. *Satterfield v. State*, 245 Ark. 337, 432 S.W.2d 472 (1968) (decision under prior law).

Where the testimony of the witnesses showed conclusively that they were accomplices and took part in the conspiracy, the question of whether they were accomplices for purposes of § 16-89-111 is one of law. *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

Cited: *Bowles v. State*, 265 Ark. 457, 579 S.W.2d 596 (1979); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981); *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982); *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985); *Heffernan v. Lock-*

hart, 834 F.2d 1431 (8th Cir. 1987); Wilson v. State, 25 Ark. App. 126, 753 S.W.2d 287 (1988); Perkins v. State, 298 Ark. 322, 767 S.W.2d 514 (1989); Wilford v. State, 300 Ark. 185, 777 S.W.2d 855 (1989); Wilson v. State, 301 Ark. 342, 783 S.W.2d 852 (1990); Clements v. State, 303 Ark. 319, 796 S.W.2d 839 (1990); Wofford v. State, 44 Ark. App. 94, 867 S.W.2d 181 (1993); Kennedy v. State, 325 Ark. 3, 923 S.W.2d 274 (1996); Peete v. State, 59 Ark. App. 186, 955 S.W.2d 708 (1997).

5-2-404. Defenses.

- (a) Unless otherwise provided by the statute defining the offense, a person is not an accomplice in an offense if:
 - (1) The person is a victim of the offense; or
 - (2) The offense is defined so that the person's conduct is inevitably incident to the commission of the offense.
- (b) It is an affirmative defense to a prosecution for an offense respecting which the liability of the defendant is based on the conduct of another person that the defendant terminates his or her complicity prior to the commission of the offense and:
 - (1) Wholly deprives his or her complicity of effectiveness in the commission of the offense;
 - (2) Gives timely warning to an appropriate law enforcement authority; or
 - (3) Otherwise makes a proper effort to prevent commission of the offense.

History. Acts 1975, No. 280, § 305; 1977, No. 474, § 1; A.S.A. 1947, § 41-305.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

CASE NOTES

ANALYSIS

Conduct incident to offense.
 Conspiracy.
 Victim of offense.

Conduct Incident to Offense.

The person who purchased a controlled substance from defendant was not an accomplice, whether or not the buyer solicited the sale. Long v. State, 260 Ark. 417, 542 S.W.2d 742 (1976).

Conspiracy.

Where an individual agreed to join conspiracy and provided funds for the accomplishment of its purpose, he did not withdraw as an accomplice when he retrieved his money; the conspiracy was in effect at the time he joined it, and his act of putting

money into the scheme sealed his status as an accomplice and co-conspirator. Strickland v. State, 16 Ark. App. 293, 701 S.W.2d 127 (1985).

Victim of Offense.

If the "victim" of incest is in fact a victim, she, or he, is not an accessory. Camp v. State, 288 Ark. 269, 704 S.W.2d 617 (1986).

The incest statute existed to protect the minor stepdaughter, even assuming that she was a willing participant; therefore the stepdaughter was a victim, not an accomplice, and corroboration of her testimony was not required. Mobbs v. State, 307 Ark. 505, 821 S.W.2d 769 (1991), overruled on other grounds by Thomas v.

State, 322 Ark. 670, 911 S.W.2d 259 (1995).

Cited: Butler v. State, 261 Ark. 369, 549 S.W.2d 65 (1977); Shrader v. State, 13 Ark.

App. 17, 678 S.W.2d 777 (1984); Johnson v. State, 288 Ark. 101, 702 S.W.2d 2 (1986);

Wilkins v. State, 324 Ark. 60, 918 S.W.2d 702 (1996).

5-2-405. Claims that are not defenses to liability for another.

In any prosecution for an offense in which the liability of the defendant is based on conduct of another person, it is no defense that:

(1) The offense charged, as defined, can be committed only by a particular class of persons and the defendant not belonging to that particular class of persons is for that reason legally incapable of committing the offense in an individual capacity, unless imposing liability on the defendant is inconsistent with the purpose of the provision establishing his or her incapacity;

(2) The other person has not been charged with, prosecuted for, convicted of, or has been acquitted of any offense or has been convicted of a different offense or degree of offense, based upon the conduct in question, even if the defendant and the other person were tried jointly; or

(3) The other person has a legal immunity from prosecution based upon the conduct in question.

History. Acts 1975, No. 280, § 304; A.S.A. 1947, § 41-304; Acts 1995, No. 1294, § 1.

A.C.R.C. Notes. Acts 1995, No. 1294, § 3, provided: "By these amendments the

General Assembly of the State of Arkansas legislatively overrules Yedrysek v. State, 293 Ark. 541, 739 S.W.2d 672 (1987)."

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

CASE NOTES

Charges Against Another.

The dismissal of charges against the principal cannot be used as a defense by an accused accomplice, and the accomplice could still be convicted. Roleson v. State, 277 Ark. 148, 640 S.W.2d 113 (1982).

The trial judge's refusal to allow the defendant accomplice to inform the jury, through instruction, testimony, etc., that the principal's conviction was reversed and dismissed on appeal, or that the principal was not currently charged, were all proper rulings by the trial judge since it was irrelevant to the accomplice's trial or

sentence that the principal was released. Roleson v. State, 277 Ark. 148, 640 S.W.2d 113 (1982).

This section clearly indicates that the absence of a battery charge against defendant's accomplice was irrelevant to the question of defendant's liability. Purifoy v. State, 307 Ark. 482, 822 S.W.2d 374 (1991).

Cited: Jared v. State, 17 Ark. App. 223, 707 S.W.2d 325 (1986); Weaver v. State, 305 Ark. 180, 806 S.W.2d 615 (1991); Parnell v. State, 323 Ark. 34, 912 S.W.2d 422 (1996).

5-2-406. Multiple convictions — Different degrees.

When two (2) or more persons are criminally liable for an offense of which there are different degrees, each person is liable only for the degree of the offense that is consistent with the person's own:

- (1) Culpable mental state; or
- (2) Accountability for an aggravating fact or circumstance.

History. Acts 1975, No. 280, § 306; A.S.A. 1947, § 41-306.

CASE NOTES

Proper Convictions.

The court did not err in convicting defendant as an accessory to a lesser degree of an offense even though both he and the principal were indicted for a higher degree of the offense and the principal was convicted of higher degree of the offense. *Fields v. State*, 213 Ark. 899, 214 S.W.2d 230 (1948) (decision under prior law).

There was no inconsistency in holding one codefendant guilty of being an accom-

plice to a lesser included offense while holding the other codefendant guilty of the greater offense. *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985).

Cited: *Ventress v. State*, 303 Ark. 194, 794 S.W.2d 619 (1990); *Taylor v. State*, 303 Ark. 586, 799 S.W.2d 519 (1990); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999).

SUBCHAPTER 5 — ORGANIZATIONS AND THEIR AGENTS

SECTION.

5-2-501. Definitions.

5-2-502. Liability of organizations.

SECTION.

5-2-503. Liability of agents.

RESEARCH REFERENCES

Am. Jur. 21 Am. Jur. 2d, *Crim. L.*, § 210.

C.J.S. 22 C.J.S., *Crim. L.*, § 84.

UALR L.J. *Survey of Arkansas Law: Criminal Law*, 4 UALR L.J. 189.

5-2-501. Definitions.

As used in this subchapter:

(1) "Agent" means any officer, director, or employee of an organization or any other person who is authorized to act in behalf of an organization;

(2) "High managerial agent" means an agent or officer of an organization who has duties of such responsibility that his or her conduct reasonably may be assumed to represent the policy of the organization.

(3) "Organization" means a legal entity and includes:

(A) A corporation, company, association, firm, partnership, or joint-stock company;

(B) A foundation, institution, society, union, club, or church; or

(C) Any other group of persons organized for any purpose.

History. Acts 1975, No. 280, § 401;
A.S.A. 1947, § 41-401.

5-2-502. Liability of organizations.

(a) An organization commits an offense if:

(1) The organization omits to discharge a specific duty of affirmative performance imposed on an organization by law and the omission is prohibited by criminal law;

(2) The conduct or result specified in the definition of the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors of a corporation or by the executive board of another type of organization or by a high managerial agent acting within the scope of his or her office or employment and in behalf of the organization; or

(3) The conduct or result specified in the definition of the offense is engaged in or caused by an agent of the organization while acting within the scope of his or her office or employment and in behalf of the organization and the offense is:

(A) A violation;

(B) A misdemeanor of any class; or

(C) Defined by a statute that clearly indicates a legislative purpose to impose criminal liability on an organization.

(b) Notwithstanding a provision of this subchapter, if the statute defining an offense designates an agent for whose conduct an organization is liable or the circumstances under which an organization is liable, the provisions of that statute apply.

History. Acts 1975, No. 280, § 402;
A.S.A. 1947, § 41-402.

5-2-503. Liability of agents.

(a) A person is criminally liable for any conduct constituting an offense that he or she performs or causes to be performed in the name of or in behalf of an organization to the same extent as if that conduct were performed in his or her own name or behalf.

(b)(1) When a duty to act or refrain from acting is imposed by law upon an organization, any agent of the organization having primary responsibility for the discharge of the duty is criminally liable for a reckless performance or omission to perform the required act to the same extent as if the duty were imposed by law directly upon the agent.

(2) A person convicted of an offense by reason of his or her criminal liability for the conduct of an organization is not subject to the sentence authorized by § 5-4-201(e).

History. Acts 1975, No. 280, § 403;
A.S.A. 1947, § 41-403.

SUBCHAPTER 6 — JUSTIFICATION

SECTION.

- 5-2-601. Definitions.
- 5-2-602. Defense.
- 5-2-603. Execution of public duty.
- 5-2-604. Choice of evils.
- 5-2-605. Use of physical force generally.
- 5-2-606. Use of physical force in defense of a person.
- 5-2-607. Use of deadly physical force in defense of a person.
- 5-2-608. Use of physical force in defense of premises.
- 5-2-609. Use of physical force in defense of property.
- 5-2-610. Use of physical force by law enforcement officers.
- 5-2-611. Use of physical force by private

SECTION.

- person aiding law enforcement officers.
- 5-2-612. Use of physical force in resisting arrest.
- 5-2-613. Use of physical force to prevent escape from correctional facility or custody of correctional officer.
- 5-2-614. Use of reckless or negligent force.
- 5-2-615 — 5-2-619. [Reserved.]
- 5-2-620. Use of force to defend persons and property within home.
- 5-2-621. Attempting to protect persons during commission of a felony.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1981, No. 884, § 3: Mar. 28, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in many instances felons have successfully sued their victims or bystanders as a result of the victims or bystanders attempting to protect themselves or others from per-

sonal injury during the commission of a felony; that such situation is fundamentally unjust; and that this Act is immediately necessary to correct such injustice. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

* RESEARCH REFERENCES

Am. Jur. 6 Am. Jur. 2d, Asslt. & B., § 46 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

C.J.S. 6A C.J.S., Asslt. & B., § 99 et seq.

22 C.J.S., Crim. L., § 53.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-2-601. Definitions.

As used in this subchapter:

(1) "Common carrier" means any vehicle used to transport for hire any member of the public;

(2) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury;

(3) "Dwelling" means an enclosed space that is used or intended to be used as a human habitation, home, or residence on a temporary or permanent basis;

(4) "Minor" means any person under eighteen (18) years of age;
(5)(A) "Occupiable structure" means a vehicle, building, or other structure:

- (i) Where any person lives or carries on a business or other calling;
- (ii) Where people assemble for a purpose of business, government, education, religion, entertainment, or public transportation; or
- (iii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.

(B) "Occupiable structure" includes each unit of an occupiable structure divided into a separately occupied unit;

(6) "Physical force" means:

- (A) Any bodily impact, restraint, or confinement; or
- (B) The threat of any bodily impact, restraint, or confinement;

(7) "Premises" means:

- (A) An occupiable structure; or
- (B) Any real property;

(8) "Unlawful physical force" means physical force that is employed without the consent of the person against whom it is directed and the employment of the physical force constitutes a criminal offense or tort or would constitute a criminal offense or tort except for a defense other than the defense of justification or privilege; and

(9) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 501;
A.S.A. 1947, § 41-501.

CASE NOTES

Deadly Physical Force.

The provocation restriction on the defense of justification applies equally to the use of "physical force" and "deadly physical force" because "deadly physical force" is defined under this section to include "physical force." *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981).

Where defendant used physical force against the victim to beat him to the point

of unconsciousness, and then took him, without consent, to a remote location and left him there, the evidence was sufficient to convict defendant of kidnapping; the victim was restrained without his consent by physical force. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Cited: *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

5-2-602. Defense.

In a prosecution for an offense, justification as defined in this subchapter is a defense.

History. Acts 1975, No. 280, § 502;
A.S.A. 1947, § 41-502.

CASE NOTES

Cited: Thomas v. State, 266 Ark. 162, 583 S.W.2d 32 (1979); Taylor v. State, 28 Ark. App. 146, 771 S.W.2d 318 (1989); Brizendine v. State, 4 Ark. App. 19, 627 S.W.2d 26 (1982);

5-2-603. Execution of public duty.

(a) Conduct that would otherwise constitute an offense is justifiable when it is:

- (1) Required or authorized by law or by a judicial decree; or
- (2) Performed by a public servant or a person acting at the public servant's direction in a reasonable exercise or performance of the public servant's official power, duty, or function.

(b) The justification afforded by this section applies if the actor reasonably believes his or her conduct is required or authorized:

- (1) By the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or tribunal or defect in the legal process; or
- (2) To assist a public servant in the performance of the public servant's duty, notwithstanding that the public servant has exceeded the public servant's legal authority.

History. Acts 1975, No. 280, § 503; A.S.A. 1947, § 41-503.

CASE NOTES

ANALYSIS

Applicability.
Public servants.

Applicability.

Defendant who sold a controlled substance to an undercover police officer was not entitled to claim justification under subdivision (b)(2) of this section. Christian

v. State, 318 Ark. 813, 889 S.W.2d 717 (1994).

Public Servants.

An undercover police officer who purchases a controlled substance from a narcotics dealer is not an accomplice of the seller. Brizendine v. State, 4 Ark. App. 19, 627 S.W.2d 26 (1982).

5-2-604. Choice of evils.

(a) Conduct that would otherwise constitute an offense is justifiable when:

- (1) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
- (2) According to ordinary standards of reasonableness, the desirability and urgency of avoiding the imminent public or private injury outweigh the injury sought to be prevented by the law proscribing the conduct.

(b) Justification under this section shall not rest upon a consideration pertaining to the morality or advisability of the statute defining the offense charged.

(c) If the actor is reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for his or her conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish a culpable mental state.

History. Acts 1975, No. 280, § 504; A.S.A. 1947, § 41-504.

CASE NOTES

ANALYSIS

In general.
Construction.
Applicability.
Actor's conduct.
Proof.

In General.

The language of this section differs to some extent from that of Tentative Draft No. 8 of the Model Penal Code and is more limiting, but the basic principles of the defense are similar to those espoused by that draft. *Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980).

Construction.

This section is to be narrowly construed and applied. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987); *Pursley v. State*, 21 Ark. App. 107, 730 S.W.2d 250 (1987).

In defendant's insurance fraud case, the trial court did not engage in a statutory interpretation of this section but, instead, simply applied the statute to the evidence presented at trial; because the state's argument merely raised the issue of application and not the interpretation of a statutory provision, the state's appeal did not involve the correct and uniform ad-

ministration of the criminal law and the argument was not a proper basis for an appeal by the State. *State v. Hagan-Sherwin*, 356 Ark. 597, 158 S.W.3d 156 (2004).

Applicability.

Justification as argued under this section does not appear to be appropriate in a charge of homicide. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979).

The choice of evils instruction should not be given in a homicide case when self-defense is argued by the defendant. *Hart v. State*, 296 Ark. 290, 756 S.W.2d 451 (1988).

Actor's Conduct.

A justification defense was unavailable under subsection (c) to parolee who knowingly and recklessly placed himself in a position where he could get into trouble. *Polk v. State*, 329 Ark. 174, 947 S.W.2d 758 (1997).

Proof.

In order for choice of evils defense to be available, there must be proof of extraordinary attendant circumstances requiring emergency measures in order to avoid an imminent public or private injury. *Pursley v. State*, 21 Ark. App. 107, 730 S.W.2d 250 (1987).

5-2-605. Use of physical force generally.

The use upon another person of physical force that would otherwise constitute an offense is justifiable under any of the following circumstances:

(1) A parent, teacher, guardian, or other person entrusted with care and supervision of a minor or an incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor or incompetent person;

(2) A warden or other authorized official of a correctional facility may use nondeadly physical force to the extent reasonably necessary to maintain order and discipline;

(3) A person responsible for the maintenance of order in a common carrier or a person acting under the responsible person's direction may use nondeadly physical force to the extent reasonably necessary to maintain order;

(4) A person who reasonably believes that another person is about to commit suicide or to inflict serious physical injury upon himself or herself may use nondeadly physical force upon the other person to the extent reasonably necessary to thwart the result;

(5) A duly licensed physician or a person assisting a duly licensed physician at the duly licensed physician's direction may use physical force for the purpose of administering a recognized form of treatment reasonably adapted to promoting the physical or mental health of a patient if the treatment is administered:

(A) With the consent of the patient or, if the patient is a minor who is unable to appreciate or understand the nature or possible consequences of the proposed medical treatment or is an incompetent person, with the consent of a parent, guardian, or other person entrusted with the patient's care and supervision; or

(B) In an emergency when the duly licensed physician reasonably believes that no person competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

History. Acts 1975, No. 280, § 505; A.S.A. 1947, § 41-505.

Teachers, discipline of students, § 6-18-501 et seq.

Cross References. Guards and other officials, powers and duties toward working county convicts, § 27-66-602.

CASE NOTES

Discipline.

Evidence was insufficient to support a finding that the physical force used by the defendant in disciplining her grandchild was unreasonable or inappropriate under the circumstances. *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997).

There was substantial evidence to support the jury's finding that defendant committed the crime of false imprisonment of her daughter by exercising excessive and unreasonable restraint that created a sub-

stantial risk of serious physical injury; there was no merit to defendant's argument that, as a parent, she could not be held liable for criminal conduct committed against her daughter because she had the lawful authority to consent to restraint of her child. *Dick v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 713 (Nov. 17, 2005).

Cited: *Walton v. State*, 53 Ark. App. 18, 918 S.W.2d 192 (1996).

5-2-606. Use of physical force in defense of a person.

(a)(1) A person is justified in using physical force upon another person to defend himself or herself or a third person from what the person reasonably believes to be the use or imminent use of unlawful

physical force by that other person, and the person may use a degree of force that he or she reasonably believes to be necessary.

(2) However, the person may not use deadly physical force except as provided in § 5-2-607.

(b) A person is not justified in using physical force upon another person if:

(1) With purpose to cause physical injury or death to the other person, the person provokes the use of unlawful physical force by the other person;

(2)(A) The person is the initial aggressor.

(B) However, the person's use of physical force upon another person is justifiable if:

(i) The person in good faith withdraws from the encounter and effectively communicates to the other person his or her purpose to withdraw from the encounter; and

(ii) The other person continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not authorized by law.

History. Acts 1975, No. 280, § 506;
A.S.A. 1947, § 41-506.

RESEARCH REFERENCES

UALR L.J. Darden, Survey of Arkansas
Law: Evidence, 2 UALR L.J. 232.

CASE NOTES

ANALYSIS

Evidence.
Instructions.
Justification.
State of mind.
Victim's prior violent acts.

Evidence.

Evidence sufficient to find that defendant could not rely upon self defense or justification as defenses. *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981); *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

Evidence held sufficient to support conviction. *Gilliam v. State*, 294 Ark. 115, 741 S.W.2d 631 (1987).

Instructions.

Evidence did not warrant the giving of an instruction on the justified use of force in self-defense. *Walton v. State*, 53 Ark. App. 18, 918 S.W.2d 192 (1996).

While this section and § 5-2-607 stated

that the defendant was justified in using force or deadly force only if he reasonably believed that the situation necessitated the defensive force employed, both first-degree and second-degree assault were committed if defendant acted recklessly, under §§ 5-13-205 and 5-13-206, and § 5-2-614 provided that justification was not available as a defense to an offense for which recklessness suffices to establish culpability; therefore, defendant was not entitled to self-defense or justification instructions with regard to his charges for first and second-degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Justification.

Where the defendant had entertained a grudge against the deceased and had used language in his hearing to provoke him to anger and cause him to bring on a combat whereby the defendant might have the opportunity of killing him or doing him

great bodily harm, the defendant would not be excused or justified in the killing unless he withdrew from the combat as far as he could and did all in his power consistent with his safety to avoid the danger and avert the necessity of the killing. *Manasco v. State*, 104 Ark. 397, 148 S.W. 1025 (1912) (decision under prior law).

Justification is not an affirmative defense; it becomes a defense when any evidence is offered tending to support its existence and such evidence may be introduced by either side. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979).

The provocation restriction on the defense of justification applies equally to the use of physical force and deadly physical force because deadly physical force is defined to include physical force; therefore an instruction combining the law under this section and under § 5-2-607 held proper. *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981).

Evidence held sufficient to find that refusal to give requested instruction regarding justification was error. *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982).

One who claims self-defense must show not only that the person killed was the aggressor, but that the accused used all reasonable means within his power and consistent with his safety to avoid the killing. *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

State of Mind.

Defendant, who alleged self-defense, should have been permitted to testify that he had been told that the deceased had previously killed three people, since the testimony was offered to show defendant's state of mind at the time of the shooting.

Pope v. State, 262 Ark. 476, 557 S.W.2d 887 (1977).

In those cases in which the specific acts of violence by the victim were directed at the defendant or were within his knowledge before the crime, they are admissible as being probative of what he reasonably believed and therefore directly relevant to his plea of self-defense; testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of defendant's beliefs. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Who aggressed is only one factor or circumstance tending to shed light on the essential element of the defense, i.e., defendant's beliefs at the time of the crime and the fact of who aggressed does not prove defendant's beliefs directly. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Victim's Prior Violent Acts.

The fact of the victim's aggressive character is probative of whether the victim was aggressor at the time of the crime, but the fact of who aggressed is not an element of the defense of justification. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Exclusion of testimony purporting to prove a violent character trait of the victim by a specific instance of prior violent conduct which was not shown to have been within the knowledge of the defendant held proper; however, trial court properly admitted reputation evidence tending to show victim's trait for violence as probative of the issue of who was the aggressor. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Cited: *Hodges v. Everett*, 2 Ark. App. 125, 617 S.W.2d 29 (1981); *Wing v. Britton*, 748 F.2d 494 (8th Cir. 1984).

5-2-607. Use of deadly physical force in defense of a person.

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

- (1) Committing or about to commit a felony involving force or violence;
- (2) Using or about to use unlawful deadly physical force; or
- (3)(A) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(B) As used in this section, "domestic abuse" means the same as defined in § 9-15-103.

(b) A person may not use deadly physical force in self-defense if he or she knows that he or she can avoid the necessity of using deadly physical force with complete safety:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) In the person's dwelling and was not the original aggressor; or

(ii) A law enforcement officer or a person assisting at the direction of a law enforcement officer; or

(2) By surrendering possession of property to a person claiming a lawful right to possession of the property.

History. Acts 1975, No. 280, § 507; A.S.A. 1947, § 41-507; Acts 1997, No. 1257, § 1.

Guard killing to prevent escape of prisoner, § 12-29-115.

Cross References. Evidence of victim's character, Evid. Rules 404 and 405.

RESEARCH REFERENCES

UALR L.J. Derden, Survey of Arkansas Law: Evidence, 2 UALR L.J. 232.

CASE NOTES

ANALYSIS

Assault.

Avoidance of danger.

Evidence.

Instructions.

Necessity.

Prior violent acts of victims.

Provocation by defendant.

Reasonable belief or state of mind.

Self-defense.

Withdrawal of aggressor.

Assault.

A condition precedent to a plea of self-defense is an assault upon the defendant of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm; a mere assault is not sufficient to justify the plea of self-defense. *Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985); *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

Avoidance of Danger.

In order to justify the taking of life in self-defense, the party must have employed all means within his power and consistent with his safety to have avoided

the danger and averted the necessity. *McPherson v. State*, 29 Ark. 225 (1874); *Palmore v. State*, 29 Ark. 248 (1874); *Fitzpatrick v. State*, 37 Ark. 238 (1881); *Dolan v. State*, 40 Ark. 454 (1883); *McDonald v. State*, 104 Ark. 317, 149 S.W. 95 (1912) (preceding decisions under prior law).

One resisting an assault must have employed all the means in his power consistent with his safety to avoid the danger and to avert the necessity of killing; however, where such an assault was so fierce as to make it, apparently, as dangerous for the person assaulted to retreat as it was to stand, it was not his duty to retreat but he could stand his ground and, if necessary to save his own life or to prevent great bodily injury, could slay his assailant. *Duncan v. State*, 49 Ark. 543, 6 S.W. 164 (1887) (decision under prior law).

A requested instruction that, although the defendant went to a house where he knew the deceased to be and that the deceased would probably attack the defendant, that if, in the encounter the defendant acted in self-defense, he must be acquitted, was properly refused as being opposed to the rule that one must have

done everything possible to avoid a killing. *Valentine v. State*, 108 Ark. 594, 159 S.W. 26 (1913) (decision under prior law).

Evidence.

Evidence of threats made by a third person against the defendant was incompetent when the same had no bearing upon the question whether or not the deceased was the aggressor. *Carter v. State*, 108 Ark. 124, 156 S.W. 443 (1913) (decision under prior law); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

Testimony showing victim had peaceful intentions toward defendant was admissible exception to hearsay rule where accused was claiming self-defense. *Hill v. State*, 255 Ark. 720, 502 S.W.2d 649 (1973) (decision under prior law).

It was improper to exclude evidence which showed that decedents had inflicted, and threatened, harm to the defendant, since, under § 16-41-101, Rule 404, where a claim of justification is raised, such evidence is relevant to the issue of who was the aggressor and whether the accused reasonably believed he was in danger of suffering unlawful deadly physical force. *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981).

Evidence sufficient to find that the killing was justified. *Calaway v. Southern Farm Bureau Life Ins. Co.*, 2 Ark. App. 69, 619 S.W.2d 301 (1981).

Evidence sufficient to find that the defendant could not rely upon self defense or justification as defenses. *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981); *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987); *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

The defendant in a murder prosecution was not entitled to have the jury instructed with regard to self-defense where (1) the defendant punched the victim in the face without provocation or aggressive action by the victim, (2) the victim did not pursue the defendant after that incident, (3) the defendant and his cohorts returned to the victim's truck, at which point the victim pointed a gun at their vehicle, (4) the defendant and his cohorts exited the vehicle and disarmed the victim, (5) the victim tried to punch the defendant, but the swing missed, (5) the defendant then knocked the victim to the ground, straddled him, and began punching him about

the head and body, and (6) the defendant's cohorts then began kicking the victim about the head and body. *Craig v. State*, 70 Ark. App. 71, 14 S.W.3d 893 (Apr. 19, 2000).

Instructions.

Refusal to give requested instruction substantially in the language of former section defining justifiable homicide was not an error where other instructions given sufficiently covered that defense. *Hogue v. State*, 194 Ark. 1089, 110 S.W.2d 11 (1937) (decision under prior law).

Instruction following the wording of former similar section held proper. *Gentry v. State*, 201 Ark. 729, 147 S.W.2d 1 (1941) (decision under prior law).

Defendant held entitled to an instruction on justifiable homicide. *Jordon v. State*, 238 Ark. 398, 382 S.W.2d 185 (1964) (decision under prior law).

Refusal to instruct the jury of self-defense held proper. *Jackson v. State*, 245 Ark. 331, 432 S.W.2d 876 (1968) (decision under prior law).

A permissible addition to a jury instruction on self-defense was where an assailant abandoned an attack which was later renewed voluntarily without justification by the person attacked, then the person renewing the attack could not prevail on a claim of self-defense. *Chaney v. State*, 256 Ark. 198, 506 S.W.2d 134 (1974) (decision under prior law).

Trial court held not required to include in its instructions to the jury the exceptions found in subdivision (b)(1). *Ervin v. State*, 262 Ark. 439, 557 S.W.2d 617 (1977).

Court did not err in giving justification instruction based on this section rather than defendant's proffered instruction, based on § 5-2-614, since defendant's instruction was a misapplication of § 5-2-614. *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982).

The trial court did not err in refusing to give one of the defendant's proposed instructions, where the defendant offered a modification of the model instruction based on this section, which modification would have changed the law that a person doesn't have to retreat if in his dwelling, to, if in his dwelling or on his curtilage. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985).

Where the undisputed proof was that

defendant walked away from the victim, went to the waiting car, got his loaded pistol from under the car seat, and then walked back to the place of confrontation and killed the victim, the defendant could have avoided the use of force with complete safety; therefore, he was not entitled to the instruction on justification. *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986).

Trial court did not err in declining proffered instruction that "dwelling" included the curtilage, and it did not err in failing to instruct that "dwelling" included porch. AMCI 4105 instruction represents an accurate statement of Arkansas law. *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

Where there is evidence of self-defense it is error for the court not to give an appropriate instruction, but the question is one of fact for the jury. *Taylor v. State*, 28 Ark. App. 146, 771 S.W.2d 318 (1989).

Evidence did not warrant an instruction on the justified use of deadly physical force in self-defense. *Walton v. State*, 53 Ark. App. 18, 918 S.W.2d 192 (1996).

Jury instruction on justification should have been given where there was conflicting evidence on justification and the State had the burden of showing that it was the defendant's alleged excessive force, rather than his initial response, that resulted in the death of the victim. *Humphrey v. State*, 332 Ark. 398, 966 S.W.2d 213 (1998).

While § 5-2-606 and this section stated that the defendant was justified in using force or deadly force only if he reasonably believed that the situation necessitated the defensive force employed, both first-degree and second-degree assault were committed if defendant acted recklessly, under §§ 5-13-205 and 5-13-206, and § 5-2-614 provided that justification was not available as a defense to an offense for which recklessness suffices to establish culpability; therefore, defendant was not entitled to self-defense or justification instructions with regard to his charges for first and second-degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Since defendant was not at his own home and was by all accounts standing outside when he commenced the shooting, and defendant failed to proffer an instruction with a complete statement of the law

regarding the use of deadly force only if retreat was not possible, the trial court did not err in declining to give an instruction on self-defense. *Ghoston v. State*, 84 Ark. App. 387, 141 S.W.3d 907 (2004).

Necessity.

No one, in resisting an assault made upon him in the course of a sudden quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or which was made from anger suddenly aroused at the time the assault is made, was justified or excused in taking the life of his assailant, unless he was so endangered by such assault as to make it necessary to kill the assailant to save his own life or to prevent a great bodily injury. *Duncan v. State*, 49 Ark. 543, 6 S.W. 164 (1887) (decision under prior law).

Homicide was justifiable if it appeared necessary to defendant. *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894); *Carpenter v. State*, 62 Ark. 286, 36 S.W. 900 (1896) (preceding decisions under prior law).

Where deceased was a law enforcement officer and the jury was instructed that if defendant had no notice of the fact, or reasonable grounds to know that the deceased was an officer and the killing was apparently necessary to save his own life or to prevent his receiving great bodily injury, the killing of the deceased was homicide in self-defense, it was not prejudicial error to refuse a further instruction to the effect if the killing appeared to the defendant to be necessary, he was justified in taking the life of the deceased. *Bruce v. State*, 68 Ark. 310, 57 S.W. 1103 (1900) (decision under prior law).

An instruction that, if the defendant shot the deceased under compulsion by third parties to save his own life, the jury should acquit, was properly refused, as unlawful compulsion was not a sufficient justification for taking the life of an innocent person. *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904) (decision under prior law).

A killing in self-defense was justifiable only when it was necessary. *Thomas v. State*, 74 Ark. 431, 86 S.W. 404 (1905) (decision under prior law).

In a prosecution for murder, an instruction on self-defense that "it must appear to the defendant at the time of the difficulty that the danger was so urgent and pressing that in order to save his own life

or to prevent his receiving great bodily injury, the killing of the deceased was necessary" was not erroneous as taking away the right of one to stand his own ground in his own home and to resist assaults. *Bealmear v. State*, 104 Ark. 616, 150 S.W. 129 (1912) (decision under prior law).

It must have appeared to defendant that the killing was necessary to save his own life, or to prevent great bodily harm. *Fisher v. State*, 109 Ark. 456, 160 S.W. 210 (1913) (decision under prior law).

Prior Violent Acts of Victims.

Refusal to admit testimony of specific prior violent acts of the victims which were unknown to the defendant held proper. *Halfacre v. State*, 277 Ark. 168, 639 S.W.2d 734 (1982).

Exclusion of testimony purporting to prove a violent character trait of the victim by a specific instance of prior violent conduct which was not shown to have been within the knowledge of the defendant held proper; however, trial court properly admitted reputation evidence tending to show victim's trait for violence as probative of the issue of who was the aggressor. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

In those cases in which the specific acts of violence by the victim were directed at the defendant or were within his knowledge before the crime, they are admissible as being probative of what he reasonably believed and therefore directly relevant to his plea of self-defense; testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of defendant's beliefs. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

The fact of the victim's aggressive character is probative of whether the victim was aggressor at the time of the crime, but the fact of who aggressed is not an element of the defense of justification. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

Provocation by Defendant.

Where the defendant brought upon himself a difficulty in which he continued until he brought upon himself a necessity to kill, the law would not hold him guiltless, yet a person accused of crime could show in justification that, although he

brought the danger upon himself, he changed his conduct and endeavored to escape but could not without striking the mortal blow. *Aikin v. State*, 58 Ark. 544, 25 S.W. 840 (1894); *Wheatley v. State*, 93 Ark. 409, 125 S.W. 414 (1910); *Ferguson v. State*, 95 Ark. 428, 129 S.W. 813 (1910); *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914) (preceding decisions under prior law).

Refusal to instruct that, although the defendant went to the room of the deceased for the purpose of bringing on a difficulty, and such difficulty was brought on by the defendant and such fight ensued, still if the deceased engaged in such fight with a chair, the same being a deadly weapon or one calculated to inflict great bodily injury upon the defendant and the defendant after being set upon with a chair, drew his pistol and fired the fatal shot, he should be acquitted held proper. *Blair v. State*, 69 Ark. 558, 64 S.W. 948 (1901) (decision under prior law).

A plea of self-defense could not be sustained where defendant called to deceased and made no effort to avoid a difficulty. *Clingan v. State*, 77 Ark. 141, 91 S.W. 12 (1905) (decision under prior law).

One using opprobrious words was not precluded from acting in self-defense, unless he used them to bring on the opportunity to kill. *Wheatley v. State*, 93 Ark. 409, 125 S.W. 414 (1910); *Ferguson v. State*, 95 Ark. 428, 129 S.W. 813 (1910) (preceding decisions under prior law).

Where the defendant had entertained a grudge against the deceased and had used language in his hearing to provoke him to anger and cause him to bring on a combat whereby the defendant might have the opportunity of killing him or doing him great bodily harm, the defendant would not be excused or justified in the killing unless he withdrew from the combat as far as he could and did all in his power consistent with his safety to avoid the danger and avert the necessity of the killing. *Manasco v. State*, 104 Ark. 397, 148 S.W. 1025 (1912) (decision under prior law).

Defendant could not provoke an assault, and then without making any effort to abandon the difficulty, shoot his assailant while his own life was not in danger. *Arnott v. State*, 109 Ark. 378, 159 S.W. 1105 (1913) (decision under prior law).

Where defendant claimed self-defense

but the undisputed evidence showed him as an aggressor, there was no prejudice where the court modified the instruction on self-defense by fully explaining to the jury the applicability of such defense. *Chaney v. State*, 256 Ark. 198, 506 S.W.2d 134 (1974) (decision under prior law).

Although no mention of provocation is found in this section, obviously the provocation restriction on the defense of justification from § 5-2-605 applies equally to the use of "physical force" and "deadly physical force" is defined under § 5-2-601 to include "physical force." *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981).

A plea of self-defense is not justified where the evidence showed the defendant armed himself and went to a place in anticipation that the decedent would be there and would attack him; or that the defendant provoked an attack upon himself by the decedent with the intention of killing the decedent. *Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985).

Reasonable Belief or State of Mind.

Where defendant acted too hastily and without due care in killing one whom he thought was about to assault him, he was guilty of manslaughter, and not justifiable or excusable homicide. *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913) (decision under prior law).

It must have appeared that the circumstances were sufficient to have excited the fears of a reasonably prudent person; a bare fear that deceased would commit the act, to prevent which the homicide was committed, was not sufficient. *Plumley v. State*, 116 Ark. 17, 171 S.W. 925 (1914) (decision under prior law).

Where the defendant fired the fatal shot under the belief that it was necessary in order to protect himself from great harm, and he fired the shot for that purpose, he should be acquitted, although the jury believed that the accused was mistaken in his conclusion as to the danger to himself. *Biddle v. State*, 131 Ark. 537, 199 S.W. 913 (1917) (decision under prior law).

One who slew another under the honest belief that his life or limb was in imminent peril and committed the act to prevent the apprehended danger was in the exercise of a lawful act, but unless he acted with due caution and circumspection, he was guilty

of manslaughter. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937) (decision under prior law).

Instruction regarding fear sufficient to justify killing was not improper nor in conflict with instruction on self-defense. *Young v. State*, 206 Ark. 19, 176 S.W.2d 151 (1943) (decision under prior law).

Defendant should have been permitted to testify that he had been told that the deceased had previously killed three people, since the testimony was offered to show defendant's state of mind at the time of the shooting. *Pope v. State*, 262 Ark. 476, 557 S.W.2d 887 (1977).

The actor must have a reasonable belief that the situation necessitates the defensive force employed; in addition, the defense is available only to one who acts reasonably in administering such force. *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982).

Who aggressed is only one factor or circumstance tending to shed light on the essential element of the defense, i.e., defendant's beliefs at the time of the crime and the fact of who aggressed does not prove defendant's beliefs directly. *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983).

The question of justification is a matter of the defendant's intent, and is a question of fact to be decided by the trier of fact. *Taylor v. State*, 28 Ark. App. 146, 771 S.W.2d 318 (1989).

Self-Defense.

Deadly physical force is justified as self-defense only if the use of such force cannot be avoided as by retreating. *Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985).

Where the defendant was walking away when the victim aimed a pistol at his back, the victim admitted she would have shot him, and a bystander warned the defendant that he was about to be shot when the defendant turned around and shot the victim, the defendant could not have retreated with complete safety and was assaulted in a manner sufficient to cause a realistic fear for his life; therefore, justification was an available defense. *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986).

One who claims self-defense must show not only that the person killed was the aggressor, but that the accused used all

reasonable means within his power and consistent with his safety to avoid the killing. *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

Neither § 5-1-111(d) nor subsection (a) of this section defines justification or self defense as an affirmative defense. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

Regardless of the trial court's mistake in describing justification or self defense as an affirmative defense, there was no reversible error because no objection was made to the instruction. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

Where defendant fired four to five shots at the victim from his car, the victim was in his car at the time and did not do anything threatening or pose any immediate harm to defendant and defendant presented little evidence to support his claim that the shooting was in self-defense, his claim was self-defense was properly rejected. *Walker v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 471 (June 15, 2005).

Withdrawal of Aggressor.

One who killed his adversary while the latter was manifestly seeking to retire from the combat was guilty of murder or manslaughter, according to the circumstances; but, where one was defending

himself from an unlawful attack, it was not incumbent upon him to suspend his defense because assailant was withdrawing himself from the immediate locality of the attempt if such withdrawal was apparently for the purpose of securing a position from which to renew the combat with effect. *Luckenbill v. State*, 52 Ark. 45, 11 S.W. 963 (1889); *Weaver v. State*, 83 Ark. 119, 102 S.W. 713 (1907); *McDonald v. State*, 104 Ark. 317, 149 S.W. 95 (1912) (preceding decisions under prior law).

Even if the jury believed that the victim was the original aggressor, it was not established, as a matter of law, that the use of deadly physical force by the defendant was justified even though, as an occupant of the house, he was not required to retreat; and even if the victim was the original aggressor, if he had, in good faith, withdrawn from the encounter, and the danger to the defendant was no longer immediate, urgent and pressing, the defendant was not justified in pursuing him to continue the fight or to use deadly physical force on him. *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

Cited: *Hampton v. State*, 6 Ark. App. 245, 639 S.W.2d 754 (1982); *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990); *Sharp v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 183 (Feb. 23, 2005).

5-2-608. Use of physical force in defense of premises.

(a) A person in lawful possession or control of premises or a vehicle is justified in using nondeadly physical force upon another person when and to the extent that the person reasonably believes the use of nondeadly physical force is necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises or vehicle.

(b) A person may use deadly physical force under the circumstances set forth in subsection (a) of this section if:

(1) Use of deadly physical force is authorized by § 5-2-607; or

(2) The person reasonably believes the use of deadly physical force is necessary to prevent the commission of arson or burglary by a trespasser.

History. Acts 1975, No. 280, § 508; A.S.A. 1947, § 41-508.

CASE NOTES

ANALYSIS

Evidence.
 Guests.
 Instructions.
 Jury question.
 Retreat.
 State of mind.

Evidence.

Defendant was entitled to have the jury consider all the conduct of the decedent in order to determine whether there was a necessity for defendant to act in defense of another or the defense of his household. *Brockwell v. State*, 260 Ark. 807, 545 S.W.2d 60 (1976).

Guests.

A guest had the same right as his host to resist a violent attempt of another to enter the house for the purpose of assaulting "any person dwelling or being therein." *King v. State*, 55 Ark. 604, 19 S.W. 110 (1892) (decision under prior law).

Instructions.

Giving an instruction to show that the theory of the state in a prosecution for manslaughter was that deceased had abandoned the controversy and that defendant renewed it was not error, where defendant's theory of self-defense and defense of home and property was fully presented in other instructions given. *Connelly v. State*, 233 Ark. 826, 350 S.W.2d 298 (1961) (decision under prior law).

Jury Question.

Whether assault was justified as in defense of accused's home was for jury. *Davis v. State*, 206 Ark. 726, 177 S.W.2d 190 (1944) (decision under prior law).

Retreat.

One who was assaulted in his own home was not bound to retreat, and if the circumstances were such as reasonably to cause the defendant to believe that he was in imminent danger of losing his own life or of receiving great bodily harm and he did so believe, then he was justified in using the force necessary to protect himself and, if necessary, to this end, he could kill the assailant. *Elder v. State*, 69 Ark. 648, 65 S.W. 938, 86 Am. St. R. 220 (1901) (decision under prior law).

State of Mind.

Verdict for defendant was authorized by evidence that defendant in his own premises shot decedent believing him to be armed and fearing an attack. *Phillips v. Turney*, 198 Ark. 364, 129 S.W.2d 963 (1939) (decision under prior law).

Instruction that if accused made the assault acting in good faith as a reasonable person under apprehension that his house or residence was about to be entered by some person for purpose of committing burglary or robbery or assaulting any person dwelling therein, and that he fired the shots under that belief in good faith, he would not be guilty, was proper. *Davis v. State*, 206 Ark. 726, 177 S.W.2d 190 (1944) (decision under prior law).

5-2-609. Use of physical force in defense of property.

A person is justified in using nondeadly physical force upon another person when and to the extent that the person reasonably believes the use of nondeadly physical force is necessary to prevent or terminate the other person's:

- (1) Commission or attempted commission of theft or criminal mischief; or
- (2) Subsequent flight from the commission or attempted commission of theft or criminal mischief.

History. Acts 1975, No. 280, § 509; A.S.A. 1947, § 41-509; Acts 2003, No. 1090, § 1.

Amendments. The 2003 amendment inserted "or she," substituted "the person's

commission or attempted commission" for "the commission or attempted commission by the other person" and added "or subsequent flight therefrom."

Cross References. Use of force to de-

fend persons and property within home,
 § 5-2-620.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Law, Criminal Liability, 26 UALR L.J. Arkansas General Assembly, Criminal 373.

5-2-610. Use of physical force by law enforcement officers.

(a) A law enforcement officer is justified in using nondeadly physical force or threatening to use deadly physical force upon another person if the law enforcement officer reasonably believes the use of nondeadly physical force or the threat of use of deadly physical force is necessary to:

(1) Effect an arrest or to prevent the escape from custody of an arrested person unless the law enforcement officer knows that the arrest is unlawful; or

(2) Defend himself or herself or a third person from what the law enforcement officer reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(b) A law enforcement officer is justified in using deadly physical force upon another person if the law enforcement officer reasonably believes that the use of deadly physical force is necessary to:

(1) Effect an arrest or to prevent the escape from custody of an arrested person whom the law enforcement officer reasonably believes has committed or attempted to commit a felony and is presently armed or dangerous; or

(2) Defend himself or herself or a third person from what the law enforcement officer reasonably believes to be the use or imminent use of deadly physical force.

History. Acts 1975, No. 280, § 510; A.S.A. 1947, § 41-510; Acts 2005, No. 1994, § 491.

Amendments. The 2005 amendment added “and is presently armed or dangerous” in (b)(1).

CASE NOTES

ANALYSIS

Conduct of officer.
 Necessity.
 Preventing escape.

Conduct of Officer.

A peace officer could not avail himself of the plea of self-defense in justification of a homicide, the necessity for which grew out of his own unlawful conduct in making an arrest. *Roberson v. State*, 53 Ark. 516, 14

S.W. 902 (1890) (decision under prior law).

If the defendant brought on the difficulty, he could not take shelter behind his character as an officer, but, rather, he stood as any other person. *Johnson v. State*, 58 Ark. 57, 23 S.W. 7 (1893) (decision under prior law).

Necessity.

Officers' right in resisting assault could rise no higher than the right of self-defense and, before taking human life, they

must have at least acted with due care and circumspection. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937) (decision under prior law).

Preventing Escape.

An officer could kill to prevent the escape of a felon. *Cavaness v. State*, 43 Ark. 331 (1884); *Green v. State*, 91 Ark. 510, 121 S.W. 727 (1909) (preceding decisions under prior law).

An officer could not kill to prevent the escape of one guilty of a misdemeanor. *Thomas v. Kinkead*, 55 Ark. 502, 18 S.W. 854 (1892); *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894) (preceding decisions under prior law).

Cited: *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982); *Forrest v. Ford*, 324 Ark. 27, 918 S.W.2d 162 (1996).

5-2-611. Use of physical force by private person aiding law enforcement officers.

(a) A person is justified in using nondeadly physical force when and to the extent the person reasonably believes the use of nondeadly physical force is necessary to:

(1) Effect the arrest of a person reasonably believed to be committing or to have committed a felony; or

(2) Prevent the escape of a person reasonably believed to have committed a felony.

(b) A person who has been directed by a law enforcement officer to assist in effecting an arrest or in preventing an escape is justified in using nondeadly physical force when and to the extent that the person reasonably believes the use of nondeadly physical force is necessary to carry out the law enforcement officer's direction.

(c) A person who has been directed by a law enforcement officer to assist in effecting an arrest or in preventing an escape is justified in using deadly physical force if the person reasonably believes the use of deadly physical force is necessary to defend himself or herself or a third person from what the person reasonably believes to be the use or imminent use of deadly physical force.

History. Acts 1975, No. 280, § 511; 1977, No. 474, § 2; A.S.A. 1947, § 41-511.

5-2-612. Use of physical force in resisting arrest.

Whether the arrest is lawful or unlawful, a person may not use physical force to resist an arrest by a person who is known or reasonably appears to be a:

(1) Law enforcement officer; or

(2) Private citizen directed by a law enforcement officer to assist in effecting an arrest.

History. Acts 1975, No. 280, § 512; A.S.A. 1947, § 41-512.

CASE NOTES

ANALYSIS

Purpose.
 Defenses.
 Instructions.
 Remedies for arrestee.

Purpose.

This section is designed to ensure that law enforcement activities are conducted peacefully by discouraging violent responses to both legal and illegal arrests. *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982).

Defenses.

This section does not deprive one of the defense of justification if a law enforcement officer uses excessive force in making an arrest; one may use such force as he reasonably believes necessary to defend against any unlawful force he reasonably believes a law enforcement officer is about to inflict upon him. *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983).

The defense of justification will fail if interposed in a case involving resistance to a lawful or unlawful arrest, whether or not under warrant, so long as the person resisting knew or should have known the arrest was by a law enforcement officer or a person acting under his direction.

Thompson v. State, 284 Ark. 403, 682 S.W.2d 742 (1985).

Instructions.

Where the jury could have found from the evidence that the defendant knew or reasonably should have known, that the man was a law enforcement officer, it was proper to instruct the jury that the defendant did not have the right to use force to resist arrest by a person who was known, or reasonably appeared, to be a law enforcement officer. *Barnes v. State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982).

Refusal to give requested instruction for a charge under § 5-54-104, where there was evidence from which the jury might have found that the defendant reasonably believed the law enforcement officers were using, or about to use, excessive physical force upon a friend of his who lay handcuffed and bleeding on the ground, was ground for reversal. *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982).

Remedies for Arrestee.

While this section prohibits an arrestee from resorting to self-help remedies, such as resisting or fleeing an arresting officer, it does not foreclose legal remedies. *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982).

5-2-613. Use of physical force to prevent escape from correctional facility or custody of correctional officer.

(a) Unless the correctional officer knows or reasonably should know that a prisoner is charged with or has been convicted of only a misdemeanor, a correctional officer employed by the Department of Correction or by a private contractor in a correctional facility housing inmates for the department or a city or county correctional officer employed in a correctional facility or jail is justified in using deadly physical force when and to the extent that the correctional officer reasonably believes the use of deadly physical force is necessary to prevent the escape of a prisoner from:

- (1) A correctional facility; or
- (2) Custody of a correctional officer outside a correctional facility for any purpose.

(b) If the correctional officer knows or reasonably should know that a prisoner is charged with or has been convicted of only a misdemeanor, only nondeadly physical force may be used.

History. Acts 1975, No. 280, § 513; A.S.A. 1947, § 41-513; Acts 1997, No. 525, § 1.

5-2-614. Use of reckless or negligent force.

(a) When a person believes that the use of physical force is necessary for any purpose justifying that use of physical force under this subchapter but the person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the justification afforded by this subchapter is unavailable in a prosecution for an offense for which recklessness or negligence suffices to establish a culpable mental state.

(b) When a person is justified under this subchapter in using physical force but he or she recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this subchapter is unavailable in a prosecution for the recklessness or negligence toward the third party.

History. Acts 1975, No. 280, § 514; A.S.A. 1947, § 41-514.

CASE NOTES

ANALYSIS

Administration of force.

Instructions.

Reasonable belief.

Administration of Force.

Where defendant acted too hastily and without due care in killing one whom he thought was about to assault him, he was guilty of manslaughter, and not justifiable or excusable homicide. *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913) (decision under prior law).

One who slew another under the honest belief that his life or limb was in imminent peril and committed the act to prevent the apprehended danger was in the exercise of a lawful act, but unless he acted with due caution and circumspection, he was guilty of manslaughter. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937) (decision under prior law).

The actor must have a "reasonable belief" that the situation necessitates the defensive force employed; in addition, the defense is available only to one who acts reasonably in administering such force. *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982).

Instructions.

It was proper for court to give instruc-

tion which was practically in language of former section which precluded bare fear of offenses from justifying a homicide. *Lamb v. State*, 218 Ark. 602, 238 S.W.2d 99 (1951) (decision under prior law).

Instruction based on § 5-2-607 rather than defendant's proffered instruction based on this section held proper. *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982).

Where proffered instruction omitted the phrase "is necessary for any of the purposes justifying that use of force under this subchapter," which appears in subsection (a), such instruction did not correctly state the law, the trial court did not err in refusing to give it. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 334 (1996).

Based upon the evidence presented at trial, there was no rational basis for the "imperfect self-defense" instruction where defendant left the residence, armed himself with a gun, returned to the residence, and opened fire upon entering the front door; therefore, defendant could not rationally argue that he recklessly or negligently formed the belief that the use of deadly force was necessary to protect himself. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002).

While §§ 5-2-606 and 5-2-607 stated that the defendant was justified in using force or deadly force only if he reasonably believed that the situation necessitated the defensive force employed, both first-degree and second-degree assault were committed if defendant acted recklessly, under §§ 5-13-205 and 5-13-206, and this section provided that justification was not available as a defense to an offense for which recklessness suffices to establish culpability; therefore, defendant was not entitled to self-defense or justification instructions with regard to his charges for first and second-degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Reasonable Belief.

It must have appeared that the circumstances were sufficient to have excited the fears of a reasonably prudent person; a bare fear that deceased would commit the act, to prevent which the homicide was committed, was not sufficient. *Plumley v.*

State, 116 Ark. 17, 171 S.W. 925 (1914) (decision under prior law).

Where the defendant fired the fatal shot under the belief that it was necessary in order to protect himself from great harm, and he fired the shot for that purpose, he should be acquitted, although the jury believed that the accused was mistaken in his conclusion as to the danger to himself. *Biddle v. State*, 131 Ark. 537, 199 S.W. 913 (1917) (decision under prior law).

Instruction regarding fear sufficient to justify killing was not improper nor in conflict with instruction on self-defense. *Young v. State*, 206 Ark. 19, 176 S.W.2d 151 (1943) (decision under prior law).

In murder prosecution, trial court did not err in refusing to give requested jury instruction that the degree of force used in self-defense is presumed reasonable when a person is in his own home and, instead, submitting to the jury AMCI 4105 concerning reasonable belief. *Jewell v. State*, 38 Ark. App. 254, 832 S.W.2d 856 (1992).

5-2-615 — 5-2-619. [Reserved.]

5-2-620. Use of force to defend persons and property within home.

(a) The right of an individual to defend himself or herself and the life of a person or property in the individual's home against harm, injury, or loss by a person unlawfully entering or attempting to enter or intrude into the home is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.

(b) There is a legal presumption that any force or means used to accomplish a purpose described in subsection (a) of this section was exercised in a lawful and necessary manner, unless the presumption is overcome by clear and convincing evidence to the contrary.

(c) The public policy stated in subsection (a) of this section shall be strictly complied with by the court and an appropriate instruction of this public policy shall be given to a jury sitting in trial of criminal charges brought in connection with this public policy.

History. Acts 1981, No. 880, § 1;
A.S.A. 1947, § 41-507.1.

CASE NOTES

ANALYSIS

Instructions.
Nature of right.

Unprovoked attack.

Instructions.

The trial court did not err in refusing to

instruct the jury upon this section where the jury was instructed pursuant to AMCI 4105. *Clark v. State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985); *Jewell v. State*, 38 Ark. App. 254, 832 S.W.2d 856 (1992).

Trial court did not err in instructing the jury that “reasonably believes” or “reasonable belief” means the belief that an ordinary, prudent man would form under the circumstances in question and not one recklessly or negligently formed, pursuant to AMCI 4105; the court rejected defendant’s argument that this definition would allow the jury to find defendant guilty, even if it believed facts that would require a finding of not guilty, since a finding that defendant acted negligently or recklessly would not support a conviction for first degree or second degree murder or manslaughter. *Jewell v. State*, 38 Ark. App. 254, 832 S.W.2d 856 (1992).

Nature of Right.

This section gives one the right to defend himself and others and his property against unlawful intrusion, but not the right to be an aggressor. *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983).

As far as this section may implicate the basic right to defend without retreat, a person may exercise that right “in his home” and that is consistent with § 5-2-607(b)(1) and AMCI 4105. *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

Unprovoked Attack.

Evidence was sufficient to find that the defendant’s unprovoked physical attack was unlawful. *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983).

Cited: *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983).

5-2-621. Attempting to protect persons during commission of a felony.

No person is civilly liable for an action or omission intended to protect himself or herself or another from a personal injury during the commission of a felony unless the action or omission constitutes a felony.

History. Acts 1981, No. 884, § 1; A.S.A. 1947, § 41-507.2; Acts 2005, No. 1994, § 480.

Amendments. The 2005 amendment added “unless such actions or omissions constitute a felony.”

CHAPTER 3

INCHOATE OFFENSES

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. CRIMINAL ATTEMPT.
3. CRIMINAL SOLICITATION.
4. CRIMINAL CONSPIRACY.

RESEARCH REFERENCES

Am. Jur. 21 *Am. Jur. 2d*, *Crim. L.*, § 174 et seq.

C.J.S. 21 *C.J.S.*, *Crim. L.*, § 114 et seq., § 126 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-3-101. Mitigation — Affirmative defense.

5-3-102. Multiple convictions barred.

SECTION.

5-3-103. Solicitation and conspiracy — Defenses and claims that are not defenses.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

5-3-101. Mitigation — Affirmative defense.

It is an affirmative defense to a prosecution for criminal attempt, solicitation, or conspiracy that:

- (1) The conduct charged to constitute the offense is inherently unlikely to result or to culminate in the commission of a crime; and
- (2) Neither the conduct nor the defendant presents a public danger warranting imposition of criminal liability.

History. Acts 1975, No. 280, § 715; A.S.A. 1947, § 41-715.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

CASE NOTES

Conduct Unlikely to Result in Crime.

The plan or plans discussed by which a crime could be committed certainly cannot be characterized as conduct inherently

unlikely to result or to culminate in the commission of a crime. *Chronister v. State*, 265 Ark. 437, 580 S.W.2d 676 (1979).

5-3-102. Multiple convictions barred.

A person may not be convicted of more than one (1) offense defined by this chapter for conduct designed to commit or to culminate in the commission of the same offense.

History. Acts 1975, No. 280, § 716; A.S.A. 1947, § 41-716.

5-3-103. Solicitation and conspiracy — Defenses and claims that are not defenses.

(a) It is a defense to a prosecution for solicitation or conspiracy to commit an offense that:

- (1) The defendant is a victim of the offense; or

(2) The offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense.

(b) It is not a defense to a prosecution for conspiracy or solicitation to commit an offense that:

(1) The defendant or the person whom the defendant solicits or with whom the defendant conspires does not occupy a particular position or have a particular characteristic that is an element of that offense, if the defendant believes that one (1) of the persons does;

(2) The person whom the defendant solicits or with whom the defendant conspires is irresponsible or is immune to prosecution or conviction for the commission of the offense or has feigned agreement;

(3) The person whom the defendant solicits or with whom the defendant conspires has not been charged with, prosecuted for, convicted of, or has been acquitted of an offense based upon the conduct alleged or has been convicted of a different offense or degree of offense, even if the defendant and the person whom the defendant solicits or with whom the defendant conspires were tried jointly;

(4) The person whom the defendant solicits or with whom the defendant conspires could not be guilty of committing that offense because that person is unaware of the criminal nature of the conduct in question or of the defendant's criminal purpose; or

(5) The offense charged, as defined, can be committed only by a particular class of persons, and the defendant, not belonging to that particular class of persons, is for that reason legally incapable of committing the offense in an individual capacity unless imposing liability on the defendant is inconsistent with the purpose of the provision establishing the defendant's incapacity.

History. Acts 1975, No. 280, § 713; A.S.A. 1947, § 41-713; Acts 1995, No. 1294, § 2.

A.C.R.C. Notes. Acts 1995, No. 1294, § 3, provided: "By these amendments the

General Assembly of the State of Arkansas legislatively overrules *Yedrysek v. State*, 293 Ark. 541, 739 S.W.2d 672 (1987)."

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 11 UALR L.J. 175.

CASE NOTES

ANALYSIS

Defense to prosecution.
Evidence.

Defense to Prosecution.

It is not a defense to a prosecution for conspiracy to commit an offense that the person with whom the defendant is alleged to have conspired has not been charged, prosecuted, convicted, or has been acquitted of an offense based upon

the conduct alleged. *Shamlin v. State*, 19 Ark. App. 165, 718 S.W.2d 462 (1986); *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

It is no defense that co-conspirators have been either acquitted or convicted of a different offense as the rationale allowing for inconsistent verdicts in conspiracy cases where the conspirators are separately tried does not pertain in the case of

joint trials; unlike where separate trials are involved, in a joint trial the state tries the co-conspirator by use of the same proof bearing on the same charges and offered before the same court or jury. *Yedrysek v. State*, 293 Ark. 541, 739 S.W.2d 672 (1987).

Evidence.

Evidence held sufficient to support conviction. *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

Cited: *Chronister v. State*, 265 Ark. 437, 580 S.W.2d 676 (1979).

SUBCHAPTER 2 — CRIMINAL ATTEMPT

SECTION.

5-3-201. Conduct constituting attempt.

5-3-202. Complicity.

SECTION.

5-3-203. Classification.

5-3-204. Renunciation.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

RESEARCH REFERENCES

ALR. Impossibility of consummation as defense to prosecution for attempt. 41 ALR 4th 588.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-3-201. Conduct constituting attempt.

(a) A person attempts to commit an offense if he or she purposely engages in conduct that:

(1) Would constitute an offense if the attendant circumstances were as the person believes them to be; or

(2) Constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as the person believes them to be.

(b) When causing a particular result is an element of the offense, a person commits the offense of criminal attempt if, acting with the kind of culpable mental state otherwise required for the commission of the offense, the person purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause the particular result.

(c) Conduct is not a substantial step under this section unless the conduct is strongly corroborative of the person's criminal purpose.

History. Acts 1975, No. 280, § 701; A.S.A. 1947, § 41-701.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS

Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

UALR L.J. Survey — Criminal Law, 10
UALR L.J. 137.

CASE NOTES

ANALYSIS

Applicability.

Appeal.

Attempted battery.

Attempted burglary.

Attempted capital murder.

Attempted kidnapping.

Attempted possession of controlled substance.

Attempted rape.

Attempted theft by deception.

Commission of the principal offense.

Conduct intended to culminate in crime.

Criminal purpose.

Evidence.

—Admission of co-defendant's statements.

Instructions.

Lesser included offenses.

Applicability.

This section states that a person commits the criminal act of attempt when his conduct constitutes a substantial step intended to result in the commission of an offense; it does not exclude any crimes from its application, nor does it list any crimes to which it applies. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Appeal.

Defendant's motion for acquittal on the attempted rape charge addressed the "substantial step" element of the crime and was therefore specific enough to preserve the issue on appeal. *Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

Attempted Battery.

Attempted battery is a crime under this section. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

The fact that the victim was injured, but not seriously, did not preclude a charge of attempted first degree battery, even though the defendant's conduct also fit the definition of battery in the third degree. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Where the defendant intended to kill or seriously injure the victim, and the defendant took a substantial step to carry out his purpose, and only because of the mis-

fire was such a misfortune avoided, the evidence supported the charge of attempted battery in the first degree. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Attempted Burglary.

Although the defendant was convicted of attempted burglary, it was nevertheless necessary to prove that he attempted to enter an occupiable structure with the purpose of committing therein an offense punishable by imprisonment. *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988).

Evidence sufficient to find appellant guilty of attempted breaking or entering. *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990).

Where there was evidence that defendant made an attempt to enter a building by the use of a key, and that he had no permission to make such an entry, the evidence was sufficient to support the finding that defendant took a substantial step toward committing the offense of burglary. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

Where defendant attempted to enter a building at 3:00 a.m., which was closed to the public, and as there was no reasonable basis for the attempted illegal entry other than for the purpose of committing a theft therein, the evidence was sufficient to support that conviction. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

Evidence of breaking into a house is not evidence of intent to commit a crime therein. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993).

Attempted Capital Murder.

Evidence was sufficient to uphold conviction for attempted capital murder. *Holbird v. State*, 301 Ark. 382, 784 S.W.2d 171 (1990).

Under this section and § 5-10-101, premeditation and deliberation constitute the necessary mental state for the commission of attempted capital murder. *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990).

The trial court did not err in allowing

the state to amend the information charging "attempt to commit capital felony murder" by allowing the deletion of the word "felony," after the state had rested its case in chief, and after the defendant's motion to dismiss, because allowing the state to strike the word "felony" from each information did not cause any real change in the nature or degree of the charges against the defendant. *Ledguies v. State*, 46 Ark. App. 144, 877 S.W.2d 946 (1994).

Where evidence showed that there was a history of domestic abuse and threats, that defendant had a knife, a pair of handcuffs, duct tape, a leatherman-type tool, and gloves when he was arrested, and that defendant told the unavailable officer that defendant intended to tie the victim up and kill her, the state had no direct evidence of defendant's intent to commit murder without the improperly admitted testimony of the unavailable officer. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Evidence was sufficient to sustain a conviction for attempted capital murder where there was substantial evidence that defendant was not merely engaged in the "act of driving"; the victim, a police officer, testified that the driver attempted to run him over, he observed a flash from the passenger side window, he realized that he had heard a gunshot, and an officer identified defendant as the driver of the vehicle. *Clark v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 516 (Sept. 23, 2004).

Trial court did not err in denying defendant's motion to suppress certain statements she made during questioning regarding her missing child; although defendant claimed that she had done the best she could to convey to the officer that she was concerned about continuing to talk to him without a lawyer present, when the officer asked defendant whether she was asking for a lawyer, she did not answer that question but continued answering other questions and did not mention a lawyer again during the interview. *Gilbert v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 861 (Nov. 17, 2004).

Even if defendant's sufficiency of the evidence argument been preserved, the appellate court would have found that the evidence supporting the verdict of guilty of attempted first-degree murder and fil-

ing a false report was substantial where defendant reported her child as missing but later told police where they could find him. *Gilbert v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 861 (Nov. 17, 2004).

Evidence was sufficient to convict defendant of criminal attempt to commit capital murder where (1) while searching for a suspect, the trooper stopped in the middle of a street and observed a vehicle 30-40 yards away; (2) the vehicle began moving towards the trooper with its headlights on; (3) the trooper then observed a flash from the passenger-side window and heard a pop, which he thought was a gunshot; (4) the trooper believed that he was shot at because he was the only person on the street at 1:30 a.m.; (5) the vehicle was later stopped and a spent shell casing that was found inside the vehicle on the passenger side matched a weapon that was found about a block and a half away from where the vehicle ultimately stopped; and (6) witnesses testified that defendant and the driver had just left the home of the suspect's aunt, whom the trooper had been previously chasing. *Simmons v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 920 (Dec. 8, 2004).

Attempted Kidnapping.

The crime of attempted kidnapping is encompassed in this section and § 5-11-102. *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

Where the evidence displayed defendant's impulse to kidnap the victim and additional impulses to batter and threaten to kill her when she resisted the kidnapping, convictions for the separate offenses of first degree terroristic threatening (§ 5-13-301), second degree battery (§ 5-13-202), and attempted kidnapping were upheld because defendant's criminal acts were not all part of the attempted kidnapping and were not a continuing course of conduct. *Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994).

Although defendant had a knife, a pair of handcuffs, duct tape, a leatherman-type tool, and gloves when he was arrested, the circumstantial evidence of defendant's intent to restrain the victim's liberty for the purpose of terrorizing or harming the victim was not overwhelming and defendant's conviction for attempted kidnap-

ping, pursuant to § 5-11-102(a) and subdivision (a)(2) of this section, was reversed. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Attempted Possession of Controlled Substance.

Evidence was sufficient to support a conviction for criminal attempt to possess crack cocaine where (1) the defendant approached an undercover officer posing as a street-level crack cocaine dealer and asked for a "thirty," (2) the defendant was thereafter arrested and found to have \$30 in his possession, and (3) the officer testified that, based on his experience in the area, the term "thirty" meant \$30 of crack cocaine. *Barnett v. State*, 68 Ark. App. 38, 3 S.W.3d 344 (1999).

Attempted Rape.

A person attempts the offense of rape if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of rape whether or not the attendant circumstances are as he believes them to be. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Where defendant had taken sexual liberties with his twelve-year-old daughter, even though he had not forced intercourse or prevented her from leaving the bedroom, the evidence of criminal attempt to rape was sufficient. *Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

Attempted removal of the victim's clothing is not essential to a finding of attempted rape; defendant's words and actions constituted substantial evidence that he intended to rape the victim and that he took a substantial step towards raping her. *Hagen v. State*, 47 Ark. App. 137, 886 S.W.2d 889 (1994).

There was sufficient evidence to convict defendant of attempted rape against an 11-year old fictional girl, who was a product of an internet email sting operation by police, because there was no defense of impossibility to attempt crimes, pursuant to subsection § 5-3-201(a)(2) of this section, and the fact that defendant drove from his home state to the alleged home state of the girl with sexual accessories and photographic equipment represented a substantial step towards completing the commission of the crime, pursuant to § 5-14-103(a)(1)(C)(i). *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003).

District court properly denied a habeas petition alleging violation of due process where substantial evidence supported attempted rape as the underlying felony for capital felony murder; review of the historical facts showed that the inmate unbuckled the victim's belt, unzipped her jeans, and removed her shirt and socks, and the inmate was seen by other witnesses in a state of partial undress. *Nance v. Norris*, 392 F.3d 284 (8th Cir. 2004), cert. denied, — U.S. —, 126 S. Ct. 133, 163 L. Ed. 2d 136 (2005).

Attempted Theft by Deception.

For the offense of attempted theft by deception, the issues are the defendant's state of mind and his belief as to what the facts are, not whether an item taken has actual value or whether the defendant actually deceived the victim. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

Evidence of attempted theft by deception held sufficient. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

Commission of the Principal Offense.

Although defendant was obliged to abort his robbery of a small store, the evidence of kidnapping, aggravated robbery, and attempted murder held sufficient. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995).

Conduct Intended to Culminate in Crime.

To warrant a conviction of attempt to commit offense it had to appear not only that defendant intended to commit the offense, but that he did some overt act toward accomplishment of his purpose. *Priest v. State*, 204 Ark. 490, 163 S.W.2d 159 (1942); *Boyd v. State*, 207 Ark. 830, 182 S.W.2d 937 (1944) (preceding decisions under prior law).

Evidence sufficient to show that defendant had taken a substantial step intended to culminate in the offense. *White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979); *Berry v. State*, 278 Ark. 578, 647 S.W.2d 453 (1983).

Evidence held insufficient to support the conviction. *White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979); *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980); *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990).

Substantial evidence existed to convict

defendant of attempted first-degree murder where defendant hid under a bed armed with a weapon and, once discovered, emerged from under that bed firing a weapon in the victim's direction; the jury could infer from these circumstances that defendant purposefully intended to engage in conduct that he hoped would result in the victim's death, and defendant had communicated his threat to kill the victim and his family to several members of the family. *Crowder-Jones v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

Criminal Purpose.

Premeditation, deliberation, and intent may be inferred from the circumstances, such as the character of the weapon used, the manner in which it is used, the nature, extent and location of the wounds inflicted, the conduct of the accused, etc. *Davis v. State*, 115 Ark. 566, 173 S.W. 829 (1914); *Nunley v. State*, 223 Ark. 838, 270 S.W.2d 904 (1954); *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (preceding decisions under prior law); *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

The intent to commit a crime could be inferred from acts and circumstances of the incident, but it could not be implied as a matter of law. *Ward v. State*, 208 Ark. 602, 186 S.W.2d 950 (1945) (decision under prior law).

It was not essential that intent should have existed for any particular length of time before the crime, as it could be conceived in a moment. *Nunley v. State*, 223 Ark. 838, 270 S.W.2d 904 (1954) (decision under prior law); *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Premeditation and deliberation held established. *Clay v. State*, 262 Ark. 285, 556 S.W.2d 137 (1977).

Premeditation and deliberation can be instantaneous. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Evidence held sufficient to show premeditation and deliberation supporting a conviction. *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990).

Whether criminal intent may be reasonably inferred from the evidence is a question of fact to be determined by the trier of fact who resolves any conflicts in testimony and determines the credibility of the

witnesses, and its conclusion on credibility is binding on the appellate court. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Since intent cannot be proven by direct evidence (intent or purpose, being a state of mind, can seldom be positively known to others), the factfinder is allowed to draw upon his own common knowledge and experience; and the presumption that a person intends the natural and probable consequences of his acts, to infer intent from the circumstances. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Evidence.

Uncorroborated testimony of the minor victims was sufficient evidence to support convictions of rape and attempted rape. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Identifications of defendant from two photographic spreads upheld. *Jackson v. State*, 318 Ark. 39, 883 S.W.2d 466 (1994).

Evidence held sufficient to support conviction. *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001).

—Admission of Co-defendant's Statements.

Trial court committed reversible error by admitting co-defendant's statement; it was a violation of defendant's Sixth Amendment right to confront witnesses where, even changing defendant's name to a pronoun, it was obvious that the references were indirect or veiled references to him and substantiated his existence and identity relative to the crime. *Jefferson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 416 (June 2, 2004).

Instructions.

Where act of defendant constituted crime, the trial court properly refused to instruct the jury on attempt. *Mallett v. State*, 17 Ark. App. 29, 702 S.W.2d 814 (1986).

Lesser Included Offenses.

Sexual abuse in the first degree is a lesser included offense of attempted rape. *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986).

Where defendant was charged under § 5-37-207 for fraudulent use of a credit card but he never obtained property as required by the section, the case was remanded for judgment of conviction to be

entered for the lesser included offense of attempted fraudulent use of credit cards. *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991).

Cited: *McGee v. State*, 262 Ark. 473, 557 S.W.2d 885 (1977); *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980); *Glenn v. United States Dep't of Labor, Occupational Safety & Health Admin.*, 517 F. Supp. 362 (E.D. Ark. 1981); *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980); cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981); *Glason v. State*, 272 Ark. 28, 611 S.W.2d 752 (1981); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Sutton v. State*, 1 Ark. App. 58, 613 S.W.2d 399 (1981); *Wilson v. State*, 272 Ark. 361, 614 S.W.2d 663 (1981); *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16

(1982); *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982); *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982); *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982); *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983); *James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983); *Rowe v. Lockhart*, 736 F.2d 457 (8th Cir. 1984); *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985); *Weddle v. State*, 15 Ark. App. 402, 695 S.W.2d 840 (1985); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Thompson v. State*, 27 Ark. App. 164, 768 S.W.2d 39 (1989); *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990); *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993); *Watkins v. State*, 320 Ark. 163, 895 S.W.2d 532 (1995).

5-3-202. Complicity.

(a) A person attempts to commit an offense if, with the purpose of aiding another person in the commission of the offense, the person engages in conduct that would establish his or her complicity under § 5-2-402 if the offense were committed by the other person.

(b) It is not a defense to a prosecution under this section that:

(1) The other person did not commit or attempt to commit an offense;
or

(2) It was impossible for the actor to assist the other person in the commission of the offense if the actor could have assisted the other person had the attendant circumstances been as the actor believed them to be.

History. Acts 1975, No. 280, § 702;
A.S.A. 1947, § 41-702.

5-3-203. Classification.

A criminal attempt is a:

- (1) Class Y felony if the offense attempted is capital murder;
- (2) Class A felony if the offense attempted is treason or a Class Y felony other than capital murder;
- (3) Class B felony if the offense attempted is a Class A felony;
- (4) Class C felony if the offense attempted is a Class B felony;
- (5) Class D felony if the offense attempted is a Class C felony;
- (6) Class A misdemeanor if the offense attempted is a Class D felony or an unclassified felony;
- (7) Class B misdemeanor if the offense attempted is a Class A misdemeanor;
- (8) Class C misdemeanor if the offense attempted is a Class B misdemeanor; or

(9) Violation if the offense attempted is a Class C misdemeanor or an unclassified misdemeanor.

History. Acts 1975, No. 280, § 703; 1981, No. 620, § 3; A.S.A. 1947, § 41-703; Acts 2005, No. 1888, § 1.

Amendments. The 2005 amendment inserted present (1) and redesignated the remaining subsections accordingly; and,

in present (2), deleted “capital murder” preceding “treason” and added “other than capital murder.”

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS

Virus: Possibilities in Arkansas’ Future, 45 Ark. L. Rev. 505.

CASE NOTES

Conviction Set Aside.

Where defendant was convicted of both attempted capital murder, ostensibly the more serious crime, which was a Class A felony, and aggravated robbery, a Class Y felony, the trial court properly set aside the attempted capital murder conviction based on the classification of the crime, rather than whether it was a lesser included offense. *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991).

Cited: *Glenn v. United States Dep’t of Labor, Occupational Safety & Health Admin.*, 517 F. Supp. 362 (E.D. Ark. 1981); *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982); *Rowe v. Lockhart*, 736 F.2d 457 (8th Cir. 1984); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990); *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991); *Wright v. State*, 80 Ark. App. 114, 91 S.W.3d 553 (2002).

5-3-204. Renunciation.

(a)(1) It is an affirmative defense to a prosecution under § 5-3-201(a)(2) or (b) that the defendant abandons his or her effort to commit the offense, and by the abandonment prevents the commission of the offense, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

(2) However, the establishment of the affirmative defense under subdivision (a)(1) of this section does not affect the liability of an accomplice who does not join in the abandonment or prevention.

(b) It is an affirmative defense to a prosecution under § 5-3-202 that the defendant terminates his or her complicity in the commission of the offense and:

(1) Wholly deprives his or her complicity of effectiveness in the commission of the offense;

(2) Gives timely warning to an appropriate law enforcement authority; or

(3) Otherwise makes a substantial effort to prevent the commission of the offense, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

History. Acts 1975, No. 280, § 704; A.S.A. 1947, § 41-704.

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

CASE NOTES

Cited: Gilbert v. State, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 861 (Nov. 17, 2004).

SUBCHAPTER 3 — CRIMINAL SOLICITATION

SECTION.

5-3-301. Conduct constituting solicitation — Classification.

SECTION.

5-3-302. Renunciation.

RESEARCH REFERENCES

ALR. Solicitation to commit crime made in single conversation, as single or against more than one person or property, multiple crimes. 24 ALR 4th 1324.

5-3-301. Conduct constituting solicitation — Classification.

(a) A person solicits the commission of an offense if, with the purpose of promoting or facilitating the commission of a specific offense, the person commands, urges, or requests another person to engage in specific conduct that would:

- (1) Constitute that offense;
- (2) Constitute an attempt to commit that offense;
- (3) Cause the result specified by the definition of that offense; or
- (4) Establish the other person's complicity in the commission or attempted commission of that offense.

(b) Criminal solicitation is a:

- (1) Class A felony if the offense solicited is capital murder, treason, or a Class Y felony;
- (2) Class B felony if the offense solicited is a Class A felony;
- (3) Class C felony if the offense solicited is a Class B felony;
- (4) Class D felony if the offense solicited is a Class C felony;
- (5) Class A misdemeanor if the offense solicited is a Class D felony or an unclassified felony;
- (6) Class B misdemeanor if the offense solicited is a Class A misdemeanor;
- (7) Class C misdemeanor if the offense solicited is a Class B misdemeanor; or
- (8) Violation if the offense solicited is a Class C misdemeanor or an unclassified misdemeanor.

History. Acts 1975, No. 280, § 705; 1981, No. 620, § 4; A.S.A. 1947, § 41-705.

Cross References. Fines, § 5-4-201. Term of imprisonment, § 5-4-401.

CASE NOTES

ANALYSIS

Evidence.

Jury instructions.

Evidence.

In a trial for solicitation to commit first-degree murder, evidence of the instrumentality to be used in the murder was entirely relevant since it clearly evidenced the purpose of the solicitation as well as the means that defendant promoted to perpetrate foul play; thus, a simulated bomb and a videotape depicting its detonation qualified as proof of a material fact under Evid. Rule 401. *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992).

There was sufficient evidence to uphold defendant's conviction of solicitation of capital murder under this section where the record showed that appellant urged undercover officer to engage in specific conduct that would constitute capital murder under § 5-10-101. *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003).

Evidence was sufficient for a conviction

of committing sexual indecency with a child where defendant offered a 14 year old girl money in exchange for sex, she understood that he had meant sexual intercourse and that he was serious, and his request amounted to solicitation; further, the appellate court found no merit in defendant's argument that he was merely rhetorically questioning a 14-year-old girl about sex, rather than soliciting her. *Heape v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 631 (Sept. 22, 2004).

Jury Instructions.

Trial court properly refused to instruct the jury, in connection with defendant's trial for solicitation to commit capital murder in violation of this section, on the defense of impossibility because there was no evidence to support a finding that the murder of the police officers was inherently unlikely. *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003).

Cited: *Chronister v. State*, 265 Ark. 437, 580 S.W.2d 676 (1979); *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982).

5-3-302. Renunciation.

It is an affirmative defense to a prosecution for criminal solicitation that the defendant prevented the commission of the offense solicited under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

History. Acts 1975, No. 280, § 706; A.S.A. 1947, § 41-706.

SUBCHAPTER 4 — CRIMINAL CONSPIRACY

SECTION.

5-3-401. Conduct constituting conspiracy.

5-3-402. Scope of conspiratorial relationship.

5-3-403. Multiple criminal objectives.

5-3-404. Classification.

SECTION.

5-3-405. Renunciation of criminal purpose.

5-3-406. Statute of limitations.

5-3-407. Venue for prosecution.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Conviction on testimony of accomplice, § 16-89-111.

RESEARCH REFERENCES

ALR. Prosecution or conviction of one case against coconspirators. 19 ALR 4th conspirator as affected by disposition of 192.

5-3-401. Conduct constituting conspiracy.

A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:

(1) The person agrees with another person or other persons that:

(A) One (1) or more of the persons will engage in conduct that constitutes that offense; or

(B) The person will aid in the planning or commission of that criminal offense; and

(2) The person or another person with whom the person conspires does any overt act in pursuance of the conspiracy.

History. Acts 1975, No. 280, § 707; A.S.A. 1947, § 41-707.

Cross References. Overt acts in conspiracy, § 16-89-112.

CASE NOTES

ANALYSIS

Accomplices.

Consummation of offense.

Evidence.

Inchoate offense.

Indictment or information.

Jury question.

Liability.

Accomplices.

A coconspirator may also be an accomplice. *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

Consummation of Offense.

A conspiracy to commit a felony was merged in the felony when committed; after the felony was consummated, the conspiracy was not indictable. *Elsley v. State*, 47 Ark. 572, 2 S.W. 337 (1886) (decision under prior law).

Evidence.

For cases discussing admissibility of acts and declarations of coconspirators, see *Benton v. State*, 78 Ark. 284, 94 S.W. 688 (1906); *Harper v. State*, 79 Ark. 594, 96 S.W. 1003 (1906); *Storms v. State*, 81

Ark. 25, 98 S.W. 678 (1906); *Cumnock v. State*, 87 Ark. 34, 112 S.W. 147 (1908); *Wiley v. State*, 92 Ark. 586, 124 S.W. 249 (1909); *Easter v. State*, 96 Ark. 629, 132 S.W. 924 (1910); *Parker v. State*, 98 Ark. 575, 137 S.W. 253 (1911) (preceding decisions under prior law); *Smith v. State*, 6 Ark. App. 228, 640 S.W.2d 805 (1982).

A conspiracy would be shown by circumstantial evidence. *Venable v. State*, 156 Ark. 564, 246 S.W. 860 (1923). See also *Powell v. State*, 133 Ark. 477, 203 S.W. 25 (1918) (decision under prior law).

Under this section, it is required that state both allege and prove specific overt act evidencing that conspiracy has been put in motion, and, provided issue is properly raised, failure to both allege and prove such an act is fatal to a conviction. *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

State may rely on inferences drawn from the course of conduct of alleged conspirators to provide evidence of the agreement. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Conspiracy to commit an unlawful act

may be proved by circumstances and the inferences drawn from the course of conduct of the alleged conspirators. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148, cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Defendant's conviction for conspiracy to commit capital murder was supported by substantial evidence. *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994).

Inchoate Offense.

A conspiracy is an inchoate offense, and under Arkansas law it is a crime in and of itself. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Indictment or Information.

An indictment for conspiracy to commit a felony had to allege that the felony was not committed. *Elsey v. State*, 47 Ark. 572, 2 S.W. 337 (1886) (decision under prior law).

Indictment that charged defendant and others with the crime of conspiracy to commit a felony clearly apprised defendant of the crime charged and amendment of the indictment to add the words "the felony not having been committed" was simply a matter of form, which did nothing to change the nature of the crime otherwise charged. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978) (decision under prior law).

Jury Question.

Where an individual's knowledge of con-

spiracy was in dispute, his complicity was a fact issue which was properly presented to the jury. *Strickland v. State*, 16 Ark. App. 293, 701 S.W.2d 127 (1985).

Liability.

A conspiracy offense under the Arkansas Criminal Code is intended to be a separate crime, and liability is not imposed on a conspirator for the substantive offenses that are the object of the conspiracy. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Where defendant was charged as a conspirator to commit a crime he could be convicted where State did not prove the crime was committed. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Where the combination of persons to do an unlawful act is shown, and the plan terminates in a crime, each person is liable for the acts of the others undertaken in furtherance of the plan. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148, cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Cited: *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982); *Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982); *Estate of Sargent v. Benton State Bank*, 279 Ark. 402, 652 S.W.2d 10 (1983); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989); *Casement v. State*, 318 Ark. 225, 884 S.W.2d 593 (1994); *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

5-3-402. Scope of conspiratorial relationship.

If an actor knows or could reasonably expect that a person with whom the actor conspires has himself or herself conspired or will conspire with another person to commit the same criminal offense, the actor is deemed to have conspired with the other person, whether or not the actor knows the other person's identity.

History. Acts 1975, No. 280, § 708; A.S.A. 1947, § 41-708.

CASE NOTES

Meeting of Coconspirators.

Proof of the actual meeting of the alleged conspirators was not necessary if it was shown that two or more persons aimed their acts toward the accomplish-

ment of the same unlawful purpose. *Chapline v. State*, 77 Ark. 444, 95 S.W. 477 (1906); *Powell v. State*, 133 Ark. 477, 203 S.W. 25 (1918) (preceding decisions under prior law).

5-3-403. Multiple criminal objectives.

If a person conspires to commit a number of criminal offenses, the person commits only one (1) conspiracy if the multiple offenses are the object of the same agreement or continuous conspiratorial relationship.

History. Acts 1975, No. 280, § 709; A.S.A. 1947, § 41-709.

CASE NOTES**ANALYSIS**

Multiple substantive offenses.
Single agreement or continuous relationship.

Multiple Substantive Offenses.

If multiple substantive offenses are committed pursuant to a single conspiracy, a conspirator may be prosecuted for each separate substantive offense in which he is a principal or an accomplice. *McMillen v. State*, 302 Ark. 601, 792 S.W.2d 315 (1990).

Single Agreement or Continuous Relationship.

A single agreement or continuous con-

spiratorial relationship constitutes a single conspiracy offense, whether intended to culminate in distinct offenses or in successive violations of the same statute, and this section clearly precludes more than one conspiracy prosecution as a result of a single agreement or relationship. *McMillen v. State*, 302 Ark. 601, 792 S.W.2d 315 (1990).

Cited: *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987); *Leach v. State*, 303 Ark. 309, 796 S.W.2d 837 (1990); *Leach v. State*, 313 Ark. 80, 852 S.W.2d 116 (1993).

5-3-404. Classification.

Criminal conspiracy is a:

- (1) Class A felony if an object of the conspiracy is commission of capital murder, treason, or a Class Y felony;
- (2) Class B felony if an object of the conspiracy is commission of a Class A felony;
- (3) Class C felony if an object of the conspiracy is commission of a Class B felony;
- (4) Class D felony if an object of the conspiracy is commission of a Class C felony;
- (5) Class A misdemeanor if an object of the conspiracy is commission of a Class D felony or an unclassified felony;
- (6) Class B misdemeanor if an object of the conspiracy is commission of a Class A misdemeanor; or
- (7) Class C misdemeanor if an object of the conspiracy is commission of a Class B misdemeanor.

History. Acts 1975, No. 280, § 714; 1981, No. 620, § 5; A.S.A. 1947, § 41-714.

Cross References. Fines, § 5-4-201.
Term of imprisonment, § 5-4-401.

CASE NOTES

Cited: *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996).

5-3-405. Renunciation of criminal purpose.

It is an affirmative defense to a prosecution for conspiracy to commit an offense that the defendant:

(1) Thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal purpose; or

(2) Terminated his or her participation in the conspiracy and:

(A) Gave timely warning to an appropriate law enforcement authority; or

(B) Otherwise made a substantial effort to prevent the commission of the offense, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal purpose.

History. Acts 1975, No. 280, § 710; A.S.A. 1947, § 41-710.

CASE NOTES

ANALYSIS

Presumption of continued participation.
Sufficiency of renunciation.

Presumption of Continued Participation.

Unless a conspirator produces affirmative evidence of withdrawal, his participation in the conspiracy is presumed to continue until the last overt act by any of

the conspirators. *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986).

Sufficiency of Renunciation.

Defendant's actions failed to renounce the conspiracy. *Strickland v. State*, 16 Ark. App. 293, 701 S.W.2d 127 (1985); *Gass v. State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986).

Cited: *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

5-3-406. Statute of limitations.

(a) For the purposes of § 5-1-109, a conspiracy is a continuing course of conduct that terminates when the offense or offenses that are the object of the conspiracy are committed.

(b) However, if a person abandons the agreement a conspiracy is terminated as to him or her only, when the person:

(1) Advises other persons with whom the person conspired of his or her abandonment; or

(2) Informs a law enforcement authority of the existence of the conspiracy and of his or her participation in the conspiracy.

History. Acts 1975, No. 280, § 711; A.S.A. 1947, § 41-711.

5-3-407. Venue for prosecution.

A prosecution for criminal conspiracy may be brought in any county where any overt act in furtherance of the conspiracy is alleged to have occurred, and that county is a proper place of venue for the prosecution of any person charged as a party to that conspiracy.

History. Acts 1975, No. 280, § 712;
A.S.A. 1947, § 41-712.

CASE NOTES

Cited: Lee v. State, 27 Ark. App. 198,
770 S.W.2d 148 (1989).

CHAPTER 4**DISPOSITION OF OFFENDERS****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. FINES, COSTS, AND RESTITUTION.
3. SUSPENSION OR PROBATION.
4. IMPRISONMENT.
5. EXTENDED TERM OF IMPRISONMENT.
6. TRIAL AND SENTENCE — CAPITAL MURDER.
7. ENHANCED PENALTIES FOR CERTAIN OFFENSES.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-5 and §§ 5-4-601 — 5-4-617 may not apply to § 5-4-618

and subchapter 7 which were enacted subsequently.

RESEARCH REFERENCES

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

Disposition of Offenders: Under Arkansas' New Criminal Code, 30 Ark. L. Rev. 222.

Wade, Comments: “Fine and/or Imprisonment”: Pauper's Dilemma or Delight? 33 Ark. L. Rev. 378.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Arkansas Law Survey, Wilson, Criminal Procedure, 7 UALR L.J. 191.

Legislative Survey, Criminal Law, 16 UALR L.J. 91.

Legislative Survey, Criminal Procedure, 16 UALR L.J. 99.

CASE NOTES

Cited: Johnson v. State, 331 Ark. 421,
961 S.W.2d 764 (1998).

Harness v. State, 352 Ark. 335, 101
S.W.3d 235 (2003).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-4-101. Definitions.

5-4-102. Presentence investigation.

5-4-103. Sentencing — Role of jury and court.

SECTION.

5-4-104. Authorized sentences generally.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Judgment and sentence generally, § 16-90-101 et seq.

Restitution by offender to victim, § 16-90-301 et seq.

Effective Dates. Acts 1983, No. 409, § 6: July 1, 1983. Emergency clause provided: "It is hereby determined by the General Assembly that certain criminal sentencing statutes are in need of immediate clarification for the more efficient administration of justice in this State. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1983."

Acts 1991, No. 608, § 8: Mar. 19, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that there is considerable confusion concerning the application and effect of sentencing provisions for Class Y felonies, second degree murder, driving while intoxicated and drug related offenses; that amendment of existing provisions is necessary to clarify

these provisions; and that this act is immediately necessary to achieve that end for the protection of the public health and safety and, therefore, should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act, being necessary for the preservation of public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, Nos. 532 and 550, § 13: Mar. 16, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the sentencing policies and standards of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect, unless provided for otherwise herein, from and after its passage and approval."

RESEARCH REFERENCES

ALR. Power of court, during same term, to increase severity of sentence. 26 ALR 4th 905.

Power of court to increase severity of unlawful sentence. 28 ALR 4th 147.

Sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR 4th 888.

Permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR 4th 192.

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 791 et seq.

Ark. L. Rev. Note, Conley v. State: Mitigation Before Guilt, 45 Ark. L. Rev. 995.

C.J.S. 24 C.J.S., Crim. L., § 1458 et seq.

UALR L.J. DiPippa, Suspending Imposition and Execution of Criminal Sentences, Etc., 10 UALR L.J. 367.

5-4-101. Definitions.

As used in this chapter:

(1)(A) "Imprisonment" means:

(i) Incarceration in a detention facility operated by the state or any of its political subdivisions; or

(ii) Home detention as described in § 16-93-708.

(B) "Imprisonment" may mean incarceration in a privately operated detention facility under contract to the state or any of its political subdivisions;

(2) "Probation" or "place on probation" means a procedure in which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence but subject to the supervision of a probation officer;

(3) "Probation officer" means a salaried officer attached to the court pursuant to § 16-93-402 or a reputable person designated by the court to supervise a defendant who is placed on probation;

(4)(A) "Restitution" means the act of making good or giving equivalent value for any loss, damage, or injury.

(B) "Restitution" may also include in the event of an injury or loss that the offender has special capacity to restore or repair a sentence to perform that reparation; and

(5) "Suspension" or "suspend imposition of sentence" means a procedure in which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

History. Acts 1975, No. 280, § 801; 1981, No. 620, § 6; A.S.A. 1947, § 41-801; Acts 1993, No. 533, § 1; 1993, No. 553, § 1; 1999, No. 216, § 1; 2005, No. 680, § 1.

Amendments. The 2005 amendment added (4)(A)(ii) and made related changes.

CASE NOTES**ANALYSIS**

Court.

Suspension or probation.

Court.

The word "court" refers to the judge, not the judge and jury. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 49 L. Ed. 2d 460 (1979).

Suspension or Probation.

A court is authorized to suspend imposition of sentence or place the defendant on probation but it may not do both since, by subsection (1) of this section, a suspension is "without supervision," while under subsection (2) of this section, probation

requires the "supervision of a probation officer." *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980); *Jefferson v. State*, 270 Ark. 909, 606 S.W.2d 592 (1980).

Cited: *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979); *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980); *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983); *Williams v. State*, 280 Ark. 543, 659 S.W.2d 948 (1983); *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986); *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986); *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989); *Ramey v. State*, 62 Ark. App. 204, 972 S.W.2d 952 (1998); *Bramucci v. State*, 76 Ark. App. 8, 62 S.W.3d 10 (2001).

5-4-102. Presentence investigation.

(a) If punishment is fixed by the court, the court may order a presentence investigation before imposing sentence.

(b)(1) The presentence investigation should be conducted by a presentence officer or another person designated by the court and should include an analysis of:

(A) The circumstances surrounding the commission of the offense,

(B) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits; and

(C) Any other matter that the investigator deems relevant or the court directs to be included.

(2) In a case involving a violation of § 5-11-106 in which a minor was unlawfully detained, restrained, taken, enticed, or kept, the presentence investigation shall include ascertaining the expenses incurred by a law enforcement agency, the Department of Health and Human Services, and the lawful custodian in searching for and returning the minor to the lawful custodian.

(c)(1) Before imposing sentence, the court may order the defendant to submit to psychiatric examination and evaluation for a period not to exceed thirty (30) days.

(2) The defendant may be remanded for psychiatric examination and evaluation to the Arkansas State Hospital, or the court may appoint a qualified psychiatrist to make the psychiatric examination and evaluation.

(d)(1) Before imposing sentence, the court shall advise the defendant or his or her counsel of the factual contents and conclusions of any presentence investigation or psychiatric examination and evaluation and afford fair opportunity, if the defendant so requests, to controvert the factual contents and conclusions.

(2) A source of confidential information does not need to be disclosed.

(e) If the defendant is sentenced to imprisonment, a copy of the report of any presentence investigation or psychiatric examination or evaluation shall be transmitted immediately to the Department of Correction or, when the defendant is committed to the custody of a specific institution, to that specific institution.

History. Acts 1975, No. 280, § 804;
A.S.A. 1947, § 41-804; Acts 1987, No. 487,
§ 2.

CASE NOTES**ANALYSIS**

Defendant's rights.
Presentence report.

Defendant's Rights.

Where the sentencing court informed the defendant of the numerous factors

that it was considering prior to pronouncing a sentence, and the defendant made no objection and did not request an opportunity to controvert the information under consideration, then the court committed no reversible error by considering such information in determining the defen-

nant's sentence. *Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (Ct. App. 1979).

The defendant does not have the right to confront the witnesses against him on matters incident to sentencing. *Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (Ct. App. 1979).

Introduction of all defendant's prior convictions was unnecessary, and denied him protection of this section. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Presentence Report.

While it would have been better practice for the trial court to have permitted the defendant to prepare and submit a presentence report, in deciding the prison terms were to run consecutively, the trial court made reference to the evidence he had already heard, and thus it appeared that he exercised his discretion and did

not just mechanically make the sentences consecutive. *Scott v. State*, 284 Ark. 388, 681 S.W.2d 915 (1985).

Nothing in this section requires that the trial judge follow the recommendation of the presentence report or that he specify the relative weight he attached to each element contained in the report before he sentences a defendant. *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979).

Although this section states that the trial court "may" order a presentence investigation and report, if it fixes the punishment, there is no authority requiring the trial court to do so. *Brown v. State*, 278 Ark. 604, 648 S.W.2d 67 (1983).

Where punishment is to be fixed by the jury, a presentence report is not required to be given to the jury when the issue of punishment is submitted. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

5-4-103. Sentencing — Role of jury and court.

(a) If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter.

(b) Except as provided by §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608, the court shall fix punishment as authorized by this chapter in any case in which:

- (1) The defendant pleads guilty to an offense;
- (2) The defendant's guilt is tried by the court;
- (3) The jury fails to agree on punishment;
- (4) The prosecution and the defense agree that the court may fix punishment; or
- (5) A jury sentence is found by the trial court or an appellate court to be in excess of the punishment authorized by law.

History. Acts 1975, No. 280, § 802; A.S.A. 1947, § 41-802; Acts 1993, No. 535, § 1; 1993, No. 551, § 1.

A.C.R.C. Notes. Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

Publisher's Notes. Acts 1993, Nos. 535 and 551, § 7, provided: "The bifurcation procedures in Sections 1 and 2 of this act [codified as § 5-4-103 and §§ 16-97-101 — 16-97-104] shall become effective on January 1, 1994, and shall expire on June 30, 1997."

Cross References. Fixing punishment, § 16-90-107.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Construction.

Applicability.

Construction with other laws.

Sentence fixed by jury.

Sentencing by court.

Constitutionality.

Arkansas's new bifurcated sentencing laws did not violate the Ex Post Facto Clause because they did not criminalize conduct that was previously non-criminal, did not increase the severity or harshness of the punishment for the offenses that defendant committed, and did not deprive him of a defense that was available to him at the time he committed the offenses with which he was charged; because the penalty or sentence authorized under the prior and new sentencing statutes remains the same as applied in defendant's situation, any change was merely procedural and not substantively prejudicial or an ex post facto violation. *Williams v. State*, 318 Ark. 846, 887 S.W.2d 530 (1994).

Arkansas's bifurcated sentencing procedures in §§ 5-4-103 and 16-97-103 are not violative of the ex post facto clause in the United States Constitution or Ark. Const., Art. 2, § 17. *Diffie v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995).

Where, on the first day of trial, the trial court conducted a proceeding under the heading of "Bill of Exceptions" in which witnesses and other trial-related matters were discussed at length and defendant had ample opportunity to make any motions, and where defendant elected to wait until the second day of trial to file his motion concerning the constitutionality of Acts 1993, Nos. 535 and 551, and alerted the court of its pendency only on the third day of trial, because an issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal, the motion in question was untimely. *Watkins v. State*, 320 Ark. 163, 895 S.W.2d 532 (1995).

When defendant was originally tried and convicted in 1993, Arkansas law then authorized, and he received, a non-bifurcated trial. However, after his original

conviction, but before his case was reversed and remanded, Arkansas law was amended to permit bifurcated trials in all felony cases. At defendant's second trial on remand, trying defendant's case pursuant to the newly-enacted bifurcated trial procedure did not violate the Ex Post Facto Clause. *Suggs v. State*, 322 Ark. 40, 907 S.W.2d 124 (1995).

In General.

Sentencing in Arkansas is entirely a matter of statute. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Since the court did not believe the "zero" punishment submitted by the jury in the primary verdict form was valid, the court could have opted to impose the jury's recommended alternative sentence of eighteen months probation instead of taking over sentencing. *Slaughter v. State*, 69 Ark. App. 65, 12 S.W.3d 240 (2000).

Construction.

Section 5-4-501, requiring that one who has previously been convicted of two or more violent felonies and who is then convicted of rape is to be sentenced to life imprisonment without parole, is not in conflict with subsection (a) of this section, providing that a jury is to fix punishment of one found guilty of a felony, because of the additional language of this section that the jury is to fix punishment "as authorized by this chapter." *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997).

Applicability.

The trial court's retroactive employment of the 1994 versions of §§ 5-4-103 and 16-97-103 to offenses committed in 1993 did not subject defendant to substantive prejudice in violation of the Ex Post Facto Clause of the United States Constitution. *Williams v. State*, 318 Ark. 846, 887 S.W.2d 530 (1994).

Construction With Other Laws.

This section does not repeal § 16-90-120; the statutes speak to two different issues and can be read in harmony. *Watson v. State*, 71 Ark. App. 52, 26 S.W.3d 588 (2000).

Merger of two capital murders was not required under § 5-1-110(d)(1), and where defendant waived a sentencing hearing, thereby giving the trial court sole sentenc-

ing authority under § 5-4-103(b)(4), the trial court had the authority to order defendant's sentences to run consecutively under § 5-4-403(a). *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

Sentence Fixed by Jury.

Under § 16-89-126(c) and this section, the defendant was entitled to have a jury fix his sentence for his conviction of driving while intoxicated, and his proffered jury instruction to this effect should have been given. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Neither the trial court nor counsel should comment on parole, because the jury would be inclined to impose excessive punishment in order to compensate for early release. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

Sentencing by Court.

Trial court's sentencing action was proper. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988).

The requirement that the jury fix the sentence does not render the presentence report requirement of § 5-65-109 meaningless; there are situations when the report still will be of value, as when the court fixes the sentence under one of the exceptions of subsection (b) of this section. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Where none of the circumstances enumerated in subsection (b) were applicable, judge lacked statutory authority to increase term of imprisonment imposed by a jury, and his action was unauthorized and illegal. *Richards v. State*, 309 Ark. 133, 827 S.W.2d 155 (1992).

Where the judge said nothing about balancing the fine and imprisonment elements of the sentence when he reduced the fine and illegally increased the sen-

tence, the appellate court had no reason to reverse the fine portion of the sentence. *Richards v. State*, 309 Ark. 133, 827 S.W.2d 155 (1992).

There is nothing in this section that limits a circuit court's discretion to what the jury was considering before the court assumed control of the matter, and sentence which was within the statutory range was not an abuse of the circuit court's discretion. *Henderson v. State*, 310 Ark. 287, 835 S.W.2d 865 (1992).

The trial court was authorized to fix punishment when the jury was unable to agree upon the punishment and only eleven jurors remained after one was disqualified. *Johnson v. State*, 328 Ark. 526, 944 S.W.2d 115 (1997).

Where the jury convicted defendant of possession of cocaine with intent to deliver and recommended a sentence of 3 years' probation, the trial court was permitted to sentence defendant to 20 years' imprisonment rather than follow the jury's recommendation; the jury's recommendation of 3 years' probation was not authorized by § 5-64-401(a)(1), which required a minimum sentence of 20 years. *Ewings v. State*, 85 Ark. App. 411, 155 S.W.3d 715 (2004).

Cited: *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981); *Scott v. State*, 284 Ark. 388, 681 S.W.2d 915 (1985); *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Fitzhugh v. State*, 293 Ark. 315, 737 S.W.2d 638 (1987); *Mulanax v. State*, 301 Ark. 321, 783 S.W.2d 851 (1990); *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992); *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992); *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997); *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002); *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

5-4-104. Authorized sentences generally.

(a) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.

(c)(1) A defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, shall be sentenced to a term of imprisonment in accordance with §§ 5-4-401 — 5-4-404.

(2) In addition to imposing a term of imprisonment, the trial court may sentence a defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, to any one (1) or more of the following:

(A) Pay a fine as authorized by §§ 5-4-201 — 5-4-203;

(B) Make restitution as authorized by § 5-4-205; or

(C) Suspend imposition of an additional term of imprisonment, as authorized by subdivision (e)(3) of this section.

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:

(1) Imprisonment as authorized by §§ 5-4-401 — 5-4-404;

(2) Probation as authorized by §§ 5-4-301 — 5-4-311;

(3) Payment of a fine as authorized by §§ 5-4-201 — 5-4-203;

(4) Restitution as authorized by a provision of § 5-4-205; or

(5) Imprisonment and payment of a fine.

(e)(1)(A) The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:

(i) Capital murder, § 5-10-101;

(ii) Treason, § 5-51-201;

(iii) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section;

(iv) Driving while intoxicated, § 5-65-103;

(v) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section; or

(vi) Engaging in a continuing criminal enterprise, former § 5-64-414.

(B)(i) In any other case, the court may suspend imposition of sentence or place the defendant on probation, in accordance with §§ 5-4-301 — 5-4-311, except as otherwise specifically prohibited by statute.

(ii) The court may not suspend execution of sentence.

(2) If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place the defendant on probation.

(3)(A) The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment.

(B) However, the court shall not sentence a defendant to imprisonment and place him or her on probation, except as authorized by § 5-4-304.

(f)(1) If the court determines that an offender under eighteen (18) years of age would be more amenable to a rehabilitation program of the Division of Youth Services of the Department of Health and Human Services and that he or she previously has not been committed to the

division on more than one (1) occasion, the court may sentence the offender under eighteen (18) years of age to the Department of Correction for a term of years, suspend the sentence, and commit him or her to the custody of the division.

(2) In a case under subdivision (f)(1) of this section, if the offender under eighteen (18) years of age completes the program of the division satisfactorily, the division shall return him or her to the sentencing court and provide the sentencing court with a written report of his or her progress and a recommendation that the offender under eighteen (18) years of age be placed on probation.

(3)(A) In the event that the offender under eighteen (18) years of age violate a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return him or her to the sentencing court with a written report of his or her conduct and a recommendation that the offender under eighteen (18) years of age be transferred to the Department of Correction.

(B) If the court finds that the offender under eighteen (18) years of age has violated a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the court shall then revoke the suspension of the sentence originally imposed and commit the offender under eighteen (18) years of age to the Department of Correction.

(g) This chapter does not deprive the court of any authority conferred by law to:

- (1) Order a forfeiture of property;
- (2) Suspend or cancel a license;
- (3) Dissolve a corporation;
- (4) Remove a person from office;
- (5) Cite for contempt;
- (6) Impose any civil penalty; or
- (7) Assess costs as set forth in subsection (h) of this section.

(h) A defendant convicted of violating § 5-11-106, in which a minor was unlawfully detained, restrained, taken, enticed, or kept, may be assessed and ordered to pay expenses incurred by a law enforcement agency, the Department of Health and Human Services, or the lawful custodian in searching for or returning the minor to the lawful custodian.

History. Acts 1975, No. 280, § 803; 1981, No. 620, § 7; 1983, No. 409, § 1; A.S.A. 1947, § 41-803; Acts 1987, No. 487, § 1; 1991, No. 608, §§ 1, 2; 1993, No. 192, § 1; 1993, No. 532, §§ 5, 9; 1993, No. 533, §§ 2, 3; 1993, No. 550, §§ 5, 9; 1993, No. 553, §§ 2, 3; 2001, No. 559, § 8.

A.C.R.C. Notes. The reference in subdivision (e)(1)(A)(vi) of this section to § 5-64-414 is a reference to the former provisions of § 5-64-414. Acts 2005, No. 1994,

§ 306, rewrote § 5-64-414 and repealed its provisions concerning the continuing criminal enterprise offense. Similar provisions to the former continuing criminal enterprise offense are now codified in § 5-64-405 which was rewritten to include those provisions by Acts 2005, No. 1994, § 305[A].

Acts 1991, No. 608, § 4, provided: "It is the express intent of this act to clarify current sentencing provisions for Class Y

felonies, second degree murder, driving while intoxicated and drug related offenses under the Uniform Controlled Substances Act. Current provisions have created considerable confusion as to what forms of punishment are permitted or prohibited in certain cases. Part of the confusion stems from the fact that § 5-4-301 has never been amended to correlate with the language of § 5-4-104, nor with amendments to other criminal offense provisions. See *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Additional confusion has arisen because the intent underlying mandatory sentences for the enumerated offenses is not furthered by disallowing the imposition of other forms of punishment in addition to mandatory imprisonment. The intent of §§ 5-4-104(e)(1) and 5-4-301(a)(1) was to insure that persons convicted of serious offenses received, and were forced to serve, sentences commensurate with the severity of the offense committed. See *id.* at 62 (Glaze, J., concurring). It is inconceivable that one convicted of the most reprehensible crime must be imprisoned, but at the same time, cannot be fined or ordered to pay restitution to the victim or the victim's family, or be subjected to a suspended additional term of imprisonment.

"Finally, confusion has arisen by the fact that certain offenses codified outside of the Criminal Code contain specific sentencing provisions that may or may not be read consistently with sentencing provi-

sions within the code. For example, current provisions under the Omnibus DWI Act (§ 5-65-101 et seq.) require mandatory imprisonment, but expressly disallow only probation for first offenders under § 16-93-303. Insofar as sentencing provisions within the Criminal Code do not expressly prohibit suspension of sentences or probation for offenses under the act, there is some question as to which provision prevails. See *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318, reh'g denied, 283 Ark. 434, 678 S.W.2d 318 (1984). It is the intent of this act to resolve the ambiguity.

"As noted in *Lovell*, *id.* at 434-B-C, statutes possessing their own penal provisions concerning probation and suspended sentences have been, and may later be, enacted. It is the intent of this act, in the amendment of §§ 5-4-104(e)(1) and 5-4-301(a)(1), to provide that provisions within acts possessing their own penal provisions will control."

Publisher's Notes. The later legislation enacting this section may have repealed § 16-90-202 by implication. See *Hodge v. State*, 320 Ark. 31, 894 S.W.2d 927 (1995).

Amendments. The 2001 amendment inserted "§ 5-10-101" in (e)(1)(A)(i); inserted "§ 5-51-201" in (e)(1)(A)(ii); inserted "§ 5-65-103" in (e)(1)(A)(iv); inserted "§ 5-10-103" in (e)(1)(A)(v); inserted "§ 5-64-414" in (e)(1)(A)(vi); substituted "the defendant" for "him" in (e)(2); inserted "or her" in (e)(3); rewrote (e)(4); and made related changes.

RESEARCH REFERENCES

ALR. Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency. 113 ALR 5th 597.

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

Legislative Survey, Criminal Law, 14 UALR L.J. 753.

Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 885.

CASE NOTES

ANALYSIS

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—Suspension prohibited.
Unauthorized sentence.

In General.

Former section which fixed penalty for certain offense did not violate the Eighth Amendment of the U.S. constitution prohibiting cruel and unusual punishment, nor was penalty cruel and unusual punishment prohibited by state constitution. *Johnson v. State*, 214 Ark. 902, 218 S.W.2d 687 (1949) (decision under prior law).

The former statute providing life imprisonment without parole did not violate the constitutional provision vesting the power to grant pardons, reprieves and commutations of sentences in the governor. *Tanner v. State*, 259 Ark. 243, 532 S.W.2d 168 (1976) (decision under prior law).

The extent of sentencing in criminal cases is controlled by the legislature, and the Arkansas circuit courts have no inherent authority to fashion sentences. *Shelton v. State*, 44 Ark. App. 156, 870 S.W.2d 398 (1994).

Construction.

The Arkansas Supreme Court has expanded the literal meaning of subsection (a) of this section to say that statutes that define a criminal offense and also possess their own sentencing provisions will control over the general code language. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Authorizing a particular form of punishment is a far cry from mandating that it be considered, or that the jury be instructed that it be considered in a given case. *Dale v. State*, 55 Ark. App. 184, 935 S.W.2d 274 (1996).

Applicability.

The version of this section in effect on the date of the crime was committed is the statute that must govern sentencing. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

The fact that Acts 1993, No. 192, now codified as subdivision (e)(1) of this section and § 5-4-301(a)(1), was approved before commission of the crime and effective after the crime did not require its application; the effective date of the act was controlling. *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995).

Authority of Court.

A trial court may reduce the extent or duration of the punishment assessed by

the jury if, in the judge's opinion, the conviction is proper but the punishment assessed is still greater than, under the circumstances of the case, ought to be inflicted, as long as the punishment is not reduced below the limit prescribed by the law under § 16-90-107(e); in such a case, the court could reduce the term of imprisonment, then suspend an additional term of imprisonment, with the sum of the two terms not exceeding the jury's original fixed term of imprisonment, meaning § 5-4-104(e)(3) is not rendered a nullity. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

Citation of Statute.

In the case of requests for probation or a suspended sentence, this section requires appellant to cite the appropriate statute under which he claims he is entitled to such relief, and if the request for probation is specific, but does not include an assertion that appellant was entitled to probation pursuant to this section and § 5-4-301, the Supreme Court will not address whether appellant is entitled to probation based on those sections. *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992).

Conversion of Fine Into Jail Term.

The equal protection rule that the state cannot impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full was not violated where the defendant, with the assistance of counsel, tendered his own schedule of payment for restitution in exchange for a suspended sentence and then made sporadic payments in violation of the payment schedule. *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

Double Jeopardy.

Where the defendant was ordered to pay a fine and simultaneously placed on probation, and the defendant paid the fine, but she violated the conditions of probation, the defendant was not unconstitutionally subjected to double jeopardy when the court revoked her probation and imposed a five-year sentence. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986).

Effect of Amendments.

Acts 1993, No. 192 amended former § 5-4-301(a)(1)(F) and former subdivision

(e)(1)(F) of this section to remove the language from the two statutes which prohibited trial courts from imposing suspended imposition of sentence or probation of controlled substance offenders; the act did not provide for retroactive application, and, thus, its operation is prospective only. *State v. Whale*, 314 Ark. 576, 863 S.W.2d 290 (1993); *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994); *State v. Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994).

Fines.

Subsection (e) of this section does not prohibit the court from imposing fines on a defendant who has previously been convicted of two or more felonies; instead, it means that the court is not allowed to impose only a fine in place of prison sentence when the defendant is a habitual offender. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

Under subsection (e) of this section, the court acted within its statutory authority in assessing a fine and at the same time placing the defendant on probation. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986).

A trial court exceeds its jurisdiction when, having imposed a sentence for a term of years, which the defendant has been serving, it adds a fine for a subsequent offense. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993).

In defendant's drug case, the court erroneously instructed the jury regarding penalties in the sentencing phase where it allowed for the jury to consider only the possibility of imprisonment when defendant was an habitual offender; the court failed to give the jury the option of considering only the payment of a fine, as authorized by subdivision (d)(3) of this section. *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Mandatory Sentences.

Since subsection (c) provides that a defendant convicted of a Class Y felony must be sentenced to imprisonment, a defendant convicted of such an offense could not be given a suspended sentence or probation even where the prosecutor agreed that some form of probation would be proper. *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

Where suspended sentences violated

the mandatory provisions of subsection (e), they were void, and since the original sentences were illegal, even though partially executed, the sentencing court could correct them, even though a notice of appeal had been filed. *Lambert v. State*, 286 Ark. 408, 692 S.W.2d 238 (1985).

The suspension of a part of the Class Y felony sentence is prohibited under subsection (e) of this section. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

Upon conviction for aggravated robbery and misdemeanor theft of property, defendant's enhanced sentence as a habitual offender with two prior felony convictions was affirmed as there was no conflict between subsection (a) of this section and § 16-90-120(a) and (b); subsection (a) refers only to the initial sentence and § 16-90-120(a) and (b) refer only to a sentence enhancement that could be added to the initial sentence. *Williams v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 724 (Nov. 17, 2005).

Probation.

Probation was not a sentence option for rape, a Class Y felony; probation was available as a sentence alternative only for certain Class Y drug offenses. *State v. Pinell*, 353 Ark. 129, 114 S.W.3d 175 (2003).

Restitution.

The power to sentence the defendant to make restitution was clearly prescribed by law, and thus the sentence was not illegal on its face. *Cotnam v. State*, 36 Ark. App. 109, 819 S.W.2d 291 (1991).

Supersession of Statute.

It is possible that § 16-90-202 may have been repealed by subsection (a) of this section. *Hodge v. State*, 320 Ark. 31, 894 S.W.2d 927 (1995).

Suspension or Probation.

Where the defendant was sentenced to a term imprisonment with part of the term to be suspended on certain conditions and when the defendant violated those conditions, the trial court had the power to sentence the defendant to another term in prison since the court's conditional suspension amounted to a decision to suspend the pronouncement of an additional number of years to the original sentence to prison. *Holland v. State*, 267 Ark. 956, 591 S.W.2d 698 (Ct. App. 1979).

Court is authorized to suspend imposition of sentence or place the defendant on probation, but it may not do both since by § 5-4-101(1), a suspension is "without supervision," while under § 5-4-101(2), probation requires the "supervision of a probation officer." *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

Where the defendant was sentenced to a term of imprisonment which was suspended with a number of years probation, upon the revocation of his probation the court could not increase his sentence since the court at the time of his original sentencing could have suspended imposition of the sentence or placed him on probation, and the court had chosen to put him on probation. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

The court, and not the jury, has the power to suspend imposition of sentence. *Rhoades v. State*, 270 Ark. 962, 607 S.W.2d 76 (Ct. App. 1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3048, 69 L. Ed. 2d 417 (1981).

Apart from this section, the common law "court probation" procedure is no longer available as a sentencing alternative. *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981).

A court probation proceeding, as codified in subsection (e) of this section, does not constitute either a "conviction" or "finding of guilt" under § 5-4-501 until the original guilty plea is finally accepted and, therefore, is inadmissible for sentence enhancement purposes in a subsequent prosecution. *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981).

Placing the defendant on probation without imposing a sentence is the essential element in "court probation"; all other statutory sentencing procedures require that a judgment of conviction be entered, and the sentence begins to run from the time of the sentence and it is immaterial whether the trial court suspends the imposition of the sentence or the execution of the sentence. *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981).

Where the trial court revoked the defendant's probation and sentenced him to a term of imprisonment at the Department of Correction, the court could not impose a term of probation on the defendant in addition to the imprisonment. *Marion v. State*, 4 Ark. App. 359, 631 S.W.2d 315 (1982).

Where court could either suspend imposition of the sentence or place the defendant on probation but it could not do both, and court entered an order suspending sentence and an order placing defendant on probation, the judgment would be construed as a suspension of the imposition of sentence for the probation period. *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983).

When a court grants unauthorized dual judgments of sentence and one is imposed and served, and the other is the suspension of a sentence, there is an election by operation of law and the sentencing court has elected to order the sentence actually imposed; the other is void. *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983).

Where the trial court sentenced the defendant to a term of imprisonment, suspended execution of the sentence, and placed him on probation, at a subsequent revocation hearing, the trial court could only revoke the fixed term remaining on the suspended sentence, and a new sentence could not be set at the revocation hearing. *Deaton v. State*, 283 Ark. 79, 671 S.W.2d 175 (1984).

A trial court was only authorized to suspend imposition of a sentence, not the execution of a sentence. *Miller v. State*, 13 Ark. App. 314, 683 S.W.2d 937 (1985).

Court probation, apart from that authorized by statute, is no longer available as a sentencing alternative inasmuch as it was codified under the Arkansas Criminal Code. The same is true of "advisory sentences" and all other unauthorized forms of sentencing where the trial court takes the defendant's plea under advisement subject to conditions which are, in essence, terms of probation or suspended sentences. *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

Where defendant was sentenced to period of imprisonment for one year and any additional term of imprisonment for a period of up to five years was suspended, imposition of nine year sentence upon revocation of suspension when court found defendant, subsequent to his release committed the crime of robbery, was proper since 10 years is the maximum for the crime for which he was placed on suspension. *Smith v. State*, 18 Ark. 152, 713 S.W.2d 241 (1986).

Where after defendant pleaded guilty to

a charge of theft, a class C felony for which the maximum sentence is 10 years, the court could sentence defendant to one year of imprisonment and suspend imposition of an additional sentence to the penitentiary for a period of five years, since the five year period of suspension did not exceed the maximum prison sentence allowable for the offense. *Smith v. State*, 18 Ark. 152, 713 S.W.2d 241 (1986).

While it is true that subsection (e) of this section provides that a defendant cannot be sentenced to a term of imprisonment to be followed by a period of probation otherwise than in accordance with § 5-4-304, a court has the authority to sentence one to a term of imprisonment to be followed by a period of suspension. *Smith v. State*, 18 Ark. 152, 713 S.W.2d 241 (1986).

After release from prison an inmate is on probation under supervision of the Department of Correction; the distinction between suspension and probation is whether supervision is exercised, and that is the reason the statutes prohibit a court from sentencing a defendant to a term in prison and following it by a period of probation. Subdivision (e)(3) of this section appears to allow a period of suspension following a term in prison. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

A trial court may not impose a sentence of imprisonment in the state Department of Correction that is followed by probation. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992).

The trial court has no inherent authority to suspend imposition of a sentence and must follow the statutory requirements of this section. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

The circuit court erred by imposing a sentence of three years' supervised probation for possession of a controlled substance with intent to deliver, pursuant to § 16-93-501(10) (repealed), where intent to deliver cocaine was a Class Y felony and a minimum sentence of 10 years was mandatory under former § 5-4-301(a)(1)(F) and former subdivision (e)(1)(F) of this section. *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994).

Where, at the time the offense was committed, § 5-64-407, former subdivision (e)(1)(F) of this section and former § 5-4-301(a)(1)(F) prohibited probation for delivery (as opposed to possession) of a

controlled substance, the trial court erred in placing defendant on probation. *State v. Landis*, 315 Ark. 681, 870 S.W.2d 704 (1994); *State v. Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994).

Court could sentence a defendant to one term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment. *Bramucci v. State*, 76 Ark. App. 8, 62 S.W.3d 10 (2001).

—Suspension Prohibited.

Effective March 16, 1993, The General Assembly, by specific terms, prohibited trial courts from suspending execution of sentences by enacting subdivision (e)(1)(B)(ii) of this section. *Meadows v. State*, 320 Ark. 686, 899 S.W.2d 72 (1995).

When a defendant is convicted of a Class Y felony, the General Assembly has specifically provided that a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

The trial court had no statutory authority to suspend the imposition of sentence or to suspend execution of the 10-year sentence on the Class Y felony charge of simultaneous possession of drugs and firearms. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

Defendant's conviction for simultaneous possession of drugs and a firearm constituted a Class Y felony for which no part of her sentence could be suspended pursuant to Ark. Code Ann. § 5-4-301(a)(1)(C); therefore, the trial court erred when it suspended 7 years of defendant's 10-year sentence. *State v. Hardiman*, 353 Ark. 125, 114 S.W.3d 164 (2003).

Under § 5-4-301(a)(1)(F), the trial court lacked statutory authority to suspend imposition of defendant's 20-year sentence for delivery of cocaine upon defendant's guilty plea in 1991 and the judgment was facially invalid, thus, the 20-year sentence that petitioner was currently serving (upon the revocation of the suspended sentence in 1998), was illegal; however, an illegal sentence could be corrected and remand for resentencing was proper. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

Unauthorized Sentence.

Where after the defendant entered a guilty plea to class C felony theft of prop-

erty, for which the maximum sentence is 10 years, a sentence of 6 years in prison, with 2 years suspended on condition that the defendant pay the sum of \$135,000 at the rate of \$200.00 per month, beginning 60 days after defendant's release from prison, and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not authorized. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

The trial court exceeded its authority by ignoring the dictates of subsection (a) and by suspending imposition of five of six years contrary to the mandate of § 5-4-501(a)(4). *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Original judgment and commitment order for driving while intoxicated, was illegal because the term of imprisonment imposed followed by a specified term of probation exceeded the maximum penalty for the offense committed and because the imposition of probation following a term of imprisonment is prohibited by this section. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1995).

Defendant's sentence of 20 years' imprisonment, suspended to an additional term of 20 years, pursuant to his guilty plea to one count of manufacturing methamphetamine, and two counts of possession of drug paraphernalia, was modified to provide that defendant was no longer required to report to a supervising officer, as the sentence was actually one of probation rather than suspension, which was a sentence specifically prohibited by statute. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Trial court was without authority, under Ark. Code Ann. § 5-4-104(e)(3) to add a five-year suspended sentence to the terms of imprisonment decided by the jury in finding defendant guilty of manufactur-

ing methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine, even though the additional sentence was suspended. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

Where the jury sentenced defendant on fifteen of the twenty counts of violation of a minor to no term of imprisonment and a fine of zero dollars, the sentence was illegal as the sentencing range was five to twenty years' imprisonment, or a fine not to exceed \$15,000, or both; thus, remand for resentencing on those counts was ordered. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

Cited: *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979); *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979); *Lingo v. State*, 271 Ark. 776, 610 S.W.2d 580 (1980); *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981); *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982); *Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Nelson v. State*, 284 Ark. 156, 680 S.W.2d 91 (1984); *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985); *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989); *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989); *Delph v. State*, 300 Ark. 492, 780 S.W.2d 527 (1989); *Palmer v. State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990); *Matthews v. State*, 305 Ark. 207, 807 S.W.2d 29 (1991); *Pennington v. State*, 305 Ark. 507, 808 S.W.2d 780 (1991); *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992); *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995); *Vega v. State*, 56 Ark. App. 145, 939 S.W.2d 322 (1997); *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

SUBCHAPTER 2 — FINES, COSTS, AND RESTITUTION

SECTION.

- 5-4-201. Fines — Limitations on amount.
- 5-4-202. Alternative sentence prohibited — Time of payment.

SECTION.

- 5-4-203. Consequences of nonpayment.
- 5-4-204. Collection after default.
- 5-4-205. Restitution.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

RESEARCH REFERENCES

ALR. Permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR 4th 192.

Amount of victim's restitution. 19 ALR 5th 823.

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 944 et seq.

C.J.S. 36A C.J.S., Fines, § 1 et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

5-4-201. Fines — Limitations on amount.

(a) A defendant convicted of a felony may be sentenced to pay a fine:

(1) Not exceeding fifteen thousand dollars (\$15,000) if the conviction is of a Class A felony or Class B felony;

(2) Not exceeding ten thousand dollars (\$10,000) if the conviction is of a Class C felony or Class D felony;

(3) In accordance with a limitation of the statute defining the felony if the conviction is of an unclassified felony.

(b) A defendant convicted of a misdemeanor may be sentenced to pay a fine:

(1) Not exceeding one thousand dollars (\$1,000) if the conviction is of a Class A misdemeanor;

(2) Not exceeding five hundred dollars (\$500) if the conviction is of a Class B misdemeanor;

(3) Not exceeding one hundred dollars (\$100) if the conviction is of a Class C misdemeanor; or

(4) In accordance with a limitation of the statute defining the misdemeanor if the conviction is of an unclassified misdemeanor.

(c) A defendant convicted of a violation may be sentenced to pay a fine:

(1) Not exceeding one hundred dollars (\$100) if the violation is defined by the Arkansas Criminal Code or defined by a statute enacted subsequent to January 1, 1976, that does not prescribe a different limitation on the amount of the fine; or

(2) In accordance with a limitation of the statute defining the violation if that statute prescribes limitations on the amount of the fine.

(d)(1) Notwithstanding a limit imposed by this section, if the defendant has derived pecuniary gain from commission of an offense, then upon conviction of the offense the defendant may be sentenced to pay a fine not exceeding two (2) times the amount of the pecuniary gain.

(2) As used in this subsection, "pecuniary gain" means the amount of money or the value of property derived from the commission of the offense, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to a lawful authority prior to the time sentence is imposed.

(e) An organization convicted of an offense may be sentenced to pay a fine authorized by subsection (d) of this section or not exceeding two (2) times the maximum fine otherwise authorized upon conviction of the offense by subsections (a), (b), or (c) of this section.

History. Acts 1975, No. 280, § 1101; A.S.A. 1947, § 41-1101.

Meaning of "Arkansas Criminal Code". See note at § 5-1-101.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Procedure, 10 UALR L.J. 567.

Survey — Probate, 10 UALR L.J. 599.

CASE NOTES

ANALYSIS

Amount of fine.

Assessment.

Unauthorized sentence.

Amount of Fine.

Imposing a fine of zero dollars is not imposing a fine at all. *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996).

Assessment.

Inasmuch as the assessment of penalties is optional with the jury, it was reversible error for the trial court to submit a verdict form which indicated that the assessment of penalties was mandatory in case of a verdict of guilty. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978).

Sentence of imprisonment and a fine was within the range of sentences for a defendant convicted of a class B felony who had previous felony convictions. *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982).

Unauthorized Sentence.

Where the jury sentenced defendant on fifteen of the twenty counts of violation of a minor to no term of imprisonment and a fine of zero dollars, the sentence was illegal as the sentencing range was five to twenty years imprisonment or a fine not to exceed \$15,000, or both; thus, remand for resentencing on those counts was or-

dered. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

Cited: *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977); *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978); *Hunter v. State*, 264 Ark. 195, 570 S.W.2d 267 (1978); *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979); *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980); *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980); *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979); *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980); *Rhoads v. State*, 270 Ark. App. 962, 607 S.W.2d 76 (1980), cert. denied, 452 U.S. 915, 101 S. Ct. 3048, 69 L. Ed. 2d 417 (1981); *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981); *Summerlin v. State*, 7 Ark. App. 10, 643 S.W.2d 582 (1982); *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983); *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983); *Wright v. Burton*, 279 Ark. 1, 648 S.W.2d 794 (1983); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985); *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986); *Duhon v. State*, 299 Ark. 503, 774 S.W.2d 830 (1989); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992); *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994); *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996).

5-4-202. Alternative sentence prohibited — Time of payment.

(a)(1) If the defendant is sentenced to pay a fine or costs, the court shall not at the same time impose an alternative sentence or imprisonment to be served if the fine or costs are not paid.

(2) In accordance with § 5-4-203, the consequences of nonpayment shall be determined only after the fine or costs have not been paid.

(b)(1) If a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made:

(A) Within a specified period of time; or

(B) In specified installments.

(2) If permission under subdivision (b)(1) of this section is not granted in the sentence, the fine or costs are payable immediately.

History. Acts 1975, No. 280, § 1102;
A.S.A. 1947, § 41-1102.

CASE NOTES

Cited: Jones v. State, 297 Ark. 485, 763
S.W.2d 81 (1989); Beard v. State, 306 Ark.
546, 816 S.W.2d 860 (1991).

5-4-203. Consequences of nonpayment.

(a)(1) When a defendant sentenced to pay a fine or costs defaults in the payment of the fine or costs or of any installment, upon the court's own motion or that of the prosecuting attorney, the court may require the person to show cause why he or she should not be imprisoned for nonpayment.

(2) The court may issue a warrant of arrest or a summons for the defendant's appearance.

(3)(A) The court may order the defendant imprisoned in the county jail or other authorized institution designated by the court until the fine or costs or a specified part of the fine or costs is paid unless the defendant shows that his or her default was not attributable to a:

(i) Purposeful refusal to obey the sentence of the court; or

(ii) Failure on the defendant's part to make a good faith effort to obtain the funds required for payment.

(B) The period of imprisonment shall not exceed the shorter period of:

(i) One (1) day for each forty dollars (\$40.00) of the fine or costs;

(ii) Thirty (30) days if the fine or costs were imposed upon conviction of a misdemeanor; or

(iii) One (1) year if the fine or costs were imposed upon conviction of a felony.

(4) If the court determines that the default in payment of fine or costs is not attributable to a cause specified in subdivision (a)(3)(A) of this section, the court may enter an order:

(A) Allowing the defendant additional time for payment;

(B) Reducing the amount of each installment; or

(C) Revoking the fine or costs or the unpaid portion of the fine or costs in whole or in part.

(b)(1) When a defendant sentenced to pay a fine or costs defaults in the payment of the fine or costs or of any installment, the clerk of the court in which payment is due shall:

(A) Submit the last known address provided to the court by the defendant to the Department of Finance and Administration; and

(B) Notify the department to suspend any driver's license held by the defendant.

(2) Upon receipt of notification under subdivision (b)(1) of this section, the department shall notify the defendant that his or her driver's license will be suspended thirty (30) days from the date of the notice.

(3) Notice from the department is sufficient if mailed to the defendant at either the:

(A) Last known address provided to the court by the defendant; or

(B) Address used by the defendant on any driver's license.

(4) Except as notified otherwise by the clerk of the court, the department shall suspend any driver's license held by the defendant as provided in this subsection.

(5) The defendant is entitled to retain or regain any driver's license if:

(A) The default is cured and the clerk of the court notifies the department to cancel or release the suspension; or

(B) The court orders reinstatement.

(c)(1)(A) When a corporation is sentenced to pay a fine or costs, it is the duty of the person authorized to make disbursements from the assets of the corporation to pay the fine or costs.

(B) If a disbursement under subdivision (c)(1)(A) of this section requires approval of the board of directors, it is the duty of the board of directors to authorize a disbursement to pay the fine or costs.

(2) Failure to comply with a duty imposed by this subsection renders a person or a director subject to imprisonment under subdivisions (a)(1)-(3) of this section.

History. Acts 1975, No. 280, § 1103; A.S.A. 1947, § 41-1103; Acts 1995 No. 1116, § 1; 2001, No. 1553, § 5; 2003, No. 110, § 1.

Amendments. The 2001 amendment added the subdivision designations in (a)(3) and (c); in (b)(1), substituted "shall submit" for "shall notify the Department of Finance and Administration, along with" and inserted "to the Department of Finance and Administration and shall no-

tify the department"; substituted "department" for "Department of Finance and Administration" in (b)(2) and (b)(5)(A)(ii); and substituted "of the notice" for "of notice" in (b)(2).

The 2003 amendment, in (a)(3)(B), added subdivision designations and made stylistic changes; and substituted "forty dollars (\$40.00)" for "ten dollars (\$10.00)" in present (a)(3)(B)(i).

CASE NOTES

ANALYSIS

In general.
Enforcement.
Jurisdiction.
Probation.
Suspended sentence.

In General.

This section basically codifies the principle that a sentence to imprisonment for nonpayment of a fine works an invidious discrimination against indigent defendants in violation of the equal protection clause of the Fourteenth Amendment. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

Enforcement.

There is no provision in this section for a statute of limitations on the period of time in which the court can enforce payment or for the application of a speedy trial rule. *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994).

Jurisdiction.

Where the defendant failed to pay the fine and costs he was sentenced to pay after entering a guilty plea to driving while intoxicated, the trial court retained jurisdiction until any fine, costs, or restitution were paid. *Basura v. City of Springdale*, 47 Ark. App. 66, 884 S.W.2d 629 (1994).

Defendant's sentence had been placed into execution when the judgment and commitment order was entered in 1999; however, the trial court neither revoked defendant's probation nor modified his sentence by the commitment or fines order in the March 2002 proceeding as the proceeding was not brought pursuant to a show-cause order, and there was no evidence that the commitment was not in lieu of payment for fines assessed in connection with defendant's 1999 guilty plea

or that he did not receive credit on his fine for the days of commitment. *Turner v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 654 (Sept. 29, 2004).

Probation.

The state has an interest in punishment and deterrence and is justified in pursuing a revocation of probation and the sentencing of a probationer for nonpayment of a fine when the defendant has willfully failed to pay the fine or failed to make bona fide efforts to do so. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority; if the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

Suspended Sentence.

Where more time had passed since the defendant was given a suspended sentence on the condition that he pay court costs and a fine than the length of the sentence, the trial court no longer had the authority to revoke the suspended sentence for the defendant's failure to pay the fine. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

Cited: *Cessor v. State*, 282 Ark. 330, 668 S.W.2d 525 (1984); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989); *Jones v. State*, 54 Ark. App. 150, 924 S.W.2d 470 (1996).

5-4-204. Collection after default.

(a) When a defendant sentenced to pay a fine or costs defaults in the payment of the fine or costs or of any installment, the fine or costs may be collected by any means authorized for the enforcement of a money judgment in a civil action.

(b) A judgment that the defendant pay a fine or costs constitutes a lien on the real property and personal property of the defendant in the

same manner and to the same extent as a money judgment in a civil action.

History. Acts 1975, No. 280, § 1104;
A.S.A. 1947, § 41-1104.

CASE NOTES

Cited: Wade v. State, 269 Ark. 685, 599 S.W.2d 764 (Ct. App. 1980); Jones v. State, 297 Ark. 485, 763 S.W.2d 81 (1989); Skelton v. City of Atkins, 317 Ark. 28, 875 S.W.2d 504 (1994), (decision under prior law).

5-4-205. Restitution.

(a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.

(2) If the court decides not to order restitution or orders restitution of only a portion of the loss suffered by the victim, the court shall state on the record in detail the reasons for not ordering restitution or for ordering restitution of only a portion of the loss.

(b)(1) Whether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense.

(2) When an offense has resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant:

(A) Pay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing;

(B) Pay the cost of necessary physical and occupational therapy and rehabilitation;

(C)(i) Reimburse the victim for income lost by the victim as a result of the offense.

(ii) The maximum that a victim may recover for lost income is fifty thousand dollars (\$50,000); and

(D) Pay an amount equal to the cost of a necessary funeral and related services in the case of an offense that resulted in bodily injury that also resulted in the death of a victim.

(3) When an offense has not resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(4)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

(B) The amount of loss may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.

(5) If any item listed in subdivision (b)(2) of this section has been paid by the Crime Victims Reparations Board and the court orders

restitution, the restitution order shall provide that the board is to be reimbursed by the defendant.

(c)(1) As used in this section and in any provision of law relating to restitution, "victim" means any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

(2) "Victim" includes a victim's estate if the victim is deceased and a victim's next of kin if the victim is deceased as a result of the offense.

(d) A record of a defendant shall not be expunged under § 16-90-901 et seq. until all court-ordered restitution has been paid.

(e)(1) Restitution shall be made immediately unless prior to the imposition of sentence the court determines that the defendant should be:

(A) Given a specified time to pay; or

(B) Allowed to pay in specified installments.

(2) In determining the method of payment, the court shall take into account:

(A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;

(B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and

(C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(f)(1) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section is a condition of the suspended imposition of sentence, probation, parole, or transfer.

(2) The court may revoke probation and any agency establishing a condition of release may revoke the conditional release if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order.

(3) In determining whether to revoke probation or conditional release, the court or releasing authority shall consider:

(A) The defendant's employment status;

(B) The defendant's earning ability;

(C) The defendant's financial resources;

(D) The willfulness of the defendant's failure to pay; and

(E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

(g)(1) The court shall enter a judgment against the defendant for the amount determined under subdivision (b)(4) of this section.

(2) The judgment may be enforced by the state or a beneficiary of the judgment in the same manner as a judgment for money in a civil action.

(3) A judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

(4) The court shall determine priority among multiple beneficiaries on the basis of:

- (A) The seriousness of the harm each beneficiary suffered;
- (B) The other resources of the beneficiaries; and
- (C) Other equitable factors.

(5) If more than one (1) defendant is convicted of the crime for which there is a judgment under this section, the defendants are jointly and severally liable for the judgment unless the court determines otherwise.

(6)(A) A judgment shall require payment to the Department of Community Correction.

(B) The department shall provide for supervision and disbursement of funds under subdivision (g)(6)(A) of this section by the department's authorized economic sanction officers.

(h)(1) A judgment under this section does not bar a remedy available in a civil action under other law.

(2) A payment under this section shall be credited against a money judgment obtained by the beneficiary of the payment in a civil action.

(3) A determination under this section and the fact that payment was or was not ordered or made:

- (A) Are not admissible in evidence in a civil action; and
- (B) Do not affect the merits of a civil action.

History. Acts 1993, No. 533, § 4; 1993, No. 553, § 4; 2001, No. 1059, § 1; 2003, No. 1336, § 1.

A.C.R.C. Notes. As originally enacted by Acts 1993, Nos. 533 and 553, § 4, this section also provided: "Any restitution type program currently being operated by a prosecuting attorney or a circuit court may continue and the Department of Community Punishment shall assist such program whenever possible."

Amendments. The 2001 amendment

inserted present (a)(2), (b)(2), (b)(3), (b)(5), (c) and (d).

The 2003 amendment substituted "partnership, corporation, or governmental entity or agency that suffers" for "partnership, or corporation who suffers" in present (c)(1); and made minor stylistic and punctuation changes.

Cross References. Arkansas Crime Victims Reparations Act, § 16-90-701.

Legislative determination, § 16-90-301 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Amount.

Amount of restitution.

Failure to comply.

Amount.

The dollar amount required for a conviction under § 5-36-103(b)(2)(A) does not put a ceiling on the amount of restitution. *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996).

Amount of Restitution.

Where the defendant pleaded no contest to theft by receiving, but was neither charged with nor pleaded no contest to burglary, he could be ordered to make restitution to antique dealers to whom he sold stolen property, but could not be ordered to make restitution for other stolen property that he was not charged with having stolen and which he was not proven to have possessed. *Fortson v.*

State, 66 Ark. App. 225, 989 S.W.2d 553 (1999).

In a prosecution for theft by deception, amounts of money paid by members of the defendant's family on his behalf to the victim had to be considered in determining the victim's actual economic loss pursuant to the statute. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000).

Although it was true that the trial court was required to determine the actual economic loss to the victims in determining the amount of restitution defendant would have to pay, the trial court's apparent failure to make that determination was not preserved for review because defendant did not object to imposition of the restitution order at trial; accordingly, he could not raise that issue for the first time on appeal. *Milton v. State*, 83 Ark. App. 42, 137 S.W.3d 402 (2003).

Restitution order that included items on it for which defendant had not been charged was reversed and remanded back

to the trial court to determine the appropriate amount of restitution under based on the value of the items that defendant was charged with stealing and pled guilty or no contest to stealing. *Simmons v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 232 (Mar. 16, 2005).

Amount of restitution defendant was ordered to pay upon being found guilty of computer fraud was found to be excessive as the trial court failed to properly calculate the victim's actual economic loss; the court should not have included the cost of investigation of defendant's crime. *Tumilson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 781 (Nov. 9, 2005).

Failure to Comply.

A defendant's failure to make bona fide efforts to seek employment or to borrow money to pay restitution may justify imprisonment. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997).

SUBCHAPTER 3 — SUSPENSION OR PROBATION

SECTION.

- 5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.
- 5-4-302. Effect of noncode statutes.
- 5-4-303. Conditions of suspension or probation.
- 5-4-304. Confinement as condition of suspension or probation.
- 5-4-305. Effect on appeal.
- 5-4-306. Time period generally — Modification.
- 5-4-307. Time period — Calculation.
- 5-4-308. Transfer of jurisdiction.
- 5-4-309. Violation of conditions — Arrest, revocation, and sentencing.

SECTION.

- 5-4-310. Revocation hearings.
- 5-4-311. Discharge and dismissal.
- 5-4-312 — 5-4-319. [Reserved.]
- 5-4-320. Certain convicted felons to observe operations of correctional facility.
- 5-4-321. Judgment in certain misdemeanor traffic cases — Postponement.
- 5-4-322. District court or city court — Probation — Fees and fines authorized.
- 5-4-323. Additional conditions — High school diploma or general education development certificate — Employment training.

Cross References. Restitution by offender to victim, § 16-90-301 et seq.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1991, No. 608, § 8: Mar. 19, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that there is considerable confusion con-

cerning the application and effect of sentencing provisions for Class Y felonies, second degree murder, driving while intoxicated and drug related offenses; that amendment of existing provisions is necessary to clarify these provisions; and that this act is immediately necessary to achieve that end for the protection of the public health and safety and, therefore, should be given effect immediately. There-

fore, an emergency is hereby declared to exist and this act, being necessary for the preservation of public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, Nos. 532 and 550, § 13: Mar. 16, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the sentencing policies and standards of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect, unless provided for otherwise herein, from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 30 and 31, § 9: Aug. 24, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly, meeting in Second Extraordinary Session, that under current law, sixteen and seventeen year olds can no longer enroll in adult education and attend a GED program, and the GED programs are more suitable than the public schools in meeting the educational needs of some sixteen and seventeen year olds. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1564, § 10: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that there is an immediate necessity for additional funding to provide for the defense of

indigent persons by public defenders that this Act so provides; and that this Act should go into effect as soon as possible in order to protect the constitutional rights of indigent defendants. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1569, § 8: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that *McGhee v. State*, ____ Ark. ____ (Oct. 15, 1998) held that a court revoking a suspended sentence or probation and adding a term of confinement as a condition of the suspension or probation, cannot subsequently revoke at a second revocation hearing and impose a term of incarceration. Therefore, in accord with the sentencing policy of the state contained in Arkansas Code 16-90-801(c), which provides that there should be a continuum of sanctions with significant intermediate sanctions (including short terms of confinement) utilized when appropriate. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Immunity of public officer from liability for injuries caused by negligently released individual. 5 ALR 4th 773.

Conditioning probation on defendant's serving part of period in jail or prison. 6 ALR 4th 446.

Injuries caused by negligently released individual. 6 ALR 4th 1155.

Hearsay evidence: Admissibility at revocation hearings. 11 ALR 4th 999.

Liability of governmental officer or entity for failure to warn or notify of release

of potentially dangerous individual from custody. 12 ALR 4th 722.

Power of court to revoke or modify probation for violations committed during the probation term. 13 ALR 4th 1240.

Propriety, as condition of probation, of requiring that probationer refrain from consumption of alcoholic beverages. 19 ALR 4th 1251.

Revocation: Acts committed after imposition of sentence but prior to commencement of probation term. 22 ALR 4th 755.

Increased sentence following revocation. 23 ALR 4th 883.

Halfway house, rehabilitation center, or

other restrictive environment as condition. 24 ALR 4th 789.

Conditioning probation on defendant's not entering specified geographical area. 28 ALR 4th 725.

Right of convicted defendant to refuse probation. 28 ALR 4th 736.

Am. Jur. 21A Am. Jur. 2d, Crim. L., 901 et seq.

C.J.S. 24 C.J.S., Crim. L., § 1571(1) et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

DiPippa, Suspending Imposition and Execution of Criminal Sentences, Etc., 10 UALR L.J. 367.

CASE NOTES

Purpose.

The provisions of this subchapter and their commentaries make it clear that the drafters of the code, as enacted in its original form, intended to abandon the concept of suspended execution of sentence in favor of suspended imposition; one of the underlying purposes for adopting the concept of suspended imposition of sentence was to provide a method for maintaining a "clean slate" for certain

offenders whose record of conviction could not theretofore be expunged as provided for first offenders and those offenders under 26 years of age, and that purpose was implemented by the adoption of §§ 5-4-301, 5-4-303, and 5-4-304. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Cited: *Pennington v. State*, 305 Ark. 507, 808 S.W.2d 780 (1991); *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.

(a)(1) A court shall not suspend imposition of sentence as to a term of imprisonment or place a defendant on probation for the following offenses:

(A) Capital murder, § 5-10-101;

(B) Treason, § 5-51-201;

(C) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c);

(D) Driving while intoxicated, § 5-65-103;

(E) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c); or

(F) Engaging in a continuing criminal enterprise, former § 5-64-414.

(2) If it is determined pursuant to § 5-4-502 that a defendant has previously been convicted of two (2) or more felonies, the court shall not:

(A) Suspend imposition of sentence; or

(B) Place the defendant on probation.

(b) In making a determination as to suspension or probation, the court shall consider whether:

(1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

(2) The defendant is in need of correctional treatment that can be provided most effectively by his or her commitment to an institution;

(3) Suspension or probation will discount the seriousness of the defendant's offense; or

(4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of the defendant's offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) While not controlling the discretion of the court, the following grounds shall be accorded weight in favor of suspension or probation:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his or her conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was a substantial ground tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the offense induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that the victim sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(8) The defendant's conduct was the result of circumstances unlikely to recur;

(9) The character and attitude of the defendant indicate that he or she is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to suspension or probation;

(11) The imprisonment of the defendant would entail excessive hardship to the defendant or to a dependent of the defendant;

(12) The defendant is elderly or in poor health; or

(13) The defendant cooperated with law enforcement authorities in his or her own prosecution or in bringing another offender to justice.

(d)(1) When the court suspends the imposition of sentence on a defendant or places him or her on probation, the court shall enter a judgment of conviction only if the court sentences the defendant to:

(A) Pay a fine and suspends imposition of sentence as to imprisonment or places the defendant on probation; or

(B) A term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.

(2) The entry of a judgment of conviction does not preclude:

(A) The modification of the original order suspending the imposition of sentence on a defendant or placing a defendant on probation following a revocation hearing held pursuant to § 5-4-310; and

(B) A modification set within the limits of §§ 5-4-303, 5-4-304, and 5-4-306.

History. Acts 1975, No. 280, § 1201; 1977, No. 474, §§ 2, 8; 1977, No. 482, § 2; A.S.A. 1947, § 41-1201; Acts 1991, No. 608, § 3; 1993, No. 192, § 2; 1999, No. 1569, § 1.

A.C.R.C. Notes. The reference in subdivision (a)(1)(F) of this section to § 5-64-414 is a reference to the former provisions of § 5-64-414. Acts 2005, No. 1994, § 306, rewrote § 5-64-414 and repealed its provisions concerning the continuing criminal enterprise offense. Similar provisions to the former continuing criminal enterprise offense are now codified in § 5-64-405 which was rewritten to include those provisions by Acts 2005, No. 1994, § 305[A].

Acts 1991, No. 608, § 4, provided: "It is the express intent of this act to clarify current sentencing provisions for Class Y felonies, second degree murder, driving while intoxicated and drug related offenses under the Uniform Controlled Substances Act. Current provisions have created considerable confusion as to what forms of punishment are permitted or prohibited in certain cases. Part of the confusion stems from the fact that § 5-4-301 has never been amended to correlate with the language of § 5-4-104, nor with amendments to other criminal offense provisions. See *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Additional confusion has arisen because the intent underlying mandatory sentences for the enumerated offenses is not furthered by disallowing the imposition of other forms of punishment in addition to mandatory imprisonment. The intent of §§ 5-4-104(e)(1) and 5-4-301(a)(1) was to

insure that persons convicted of serious offenses received, and were forced to serve, sentences commensurate with the severity of the offense committed. See *id.* at 62 (Glaze, J., concurring). It is inconceivable that one convicted of the most reprehensible crime must be imprisoned, but at the same time, cannot be fined or ordered to pay restitution to the victim or the victim's family, or be subjected to a suspended additional term of imprisonment.

"Finally, confusion has arisen by the fact that certain offenses codified outside of the Criminal Code contain specific sentencing provisions that may or may not be read consistently with sentencing provisions within the code. For example, current provisions under the Omnibus DWI Act require mandatory imprisonment, but expressly disallow only probation for first offenders under § 16-93-303. Insofar as sentencing provisions within the Criminal Code do not expressly prohibit suspension of sentences or probation for offenses under the act, there is some question as to which provision prevails. See *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318, reh'g denied, 283 Ark. 434, 678 S.W.2d 318 (1984). It is the intent of this act to resolve the ambiguity.

"As noted in *Lovell*, *id.* at 434-B-C, statutes possessing their own penal provisions concerning probation and suspended sentences have been, and may later be, enacted. It is the intent of this act, in the amendment of §§ 5-4-104(e)(1) and 5-4-301(a)(1), to provide that provisions within acts possessing their own penal provisions will control."

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, Criminal Law 14 UALR L.J. 753.

CASE NOTES

ANALYSIS

Citation of statute.
Convictions.
Court.
Court's authority.

Drug offenses.
Effect of amendments.
Entry of conviction.
Fine.
Mandatory sentences.
Mitigating circumstances.

Modification.

Suspension of sentence.

Citation of Statute.

In the case of requests for probation or a suspended sentence, it is required that appellant cite the appropriate statute under which he claims he is entitled to such relief, and if the appellant's request for probation is specific, but does not include an assertion that appellant was entitled to probation pursuant to § 5-4-104 and this section, the Supreme Court will not address whether appellant is entitled to probation based on those sections. *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992).

Convictions.

Trial court did not commit error in considering the conduct of the defendant, including prior convictions. *Lingo v. State*, 271 Ark. 776, 610 S.W.2d 580 (1981).

Section 5-4-304 was intended merely as an alternative method of sentencing, for subsection (d) of this section contains two specific exceptions to the general rule that a judgment of conviction is not to be entered against one who is placed on suspension or probation. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Where defendant received only probation, i.e., no fine or prison term, no conviction judgment should have been entered, thus entitling her later to be discharged and have all proceedings dismissed against her if she complied with the conditions of her probation. *Baker v. State*, 318 Ark. 223, 884 S.W.2d 603 (1994).

Court.

The word court refers to the judge, and not the judge and jury. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

Court's Authority.

The propriety of suspending the execution of a sentence rests in the sound discretion of the trial court, not in the appellate court. *Parker v. State*, 265 Ark. 134, 577 S.W.2d 414 (1979).

At the time of revocation of probation the trial court could impose any sentence on probationer that might have been imposed originally for the offense provided that any sentence to pay a fine or to imprisonment, when combined with any

previous fine or imprisonment imposed for the same offense, not exceed the limits of §§ 5-4-401(a)(3) and 5-4-201(a)(1). *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985).

The trial court was without authority to suspend the sentence of a defendant convicted of driving while intoxicated or put him on probation so he would not have to attend an alcohol treatment or education program. *Harris v. State*, 285 Ark. 345, 686 S.W.2d 440 (1985).

The court did not have the power to revoke defendant's suspended sentence prior to the commencement of the suspension period. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Drug Offenses.

Former subdivision (a)(1)(F) of this section includes possession of methamphetamine with intent to deliver. *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994).

Where defendant pleaded guilty to possession with the intent to deliver, and should have been sentenced to at least ten years imprisonment without probation under § 5-64-401(a)(1)(i), the trial judge had no authority to order probation based on the judge's sua sponte reduction of the charge to mere possession. *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994).

Effect of Amendments.

The version of this section in effect on the date of the crime was committed is the statute that must govern sentencing. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

The trial court could not suspend the sentence for a violation of § 5-64-401 committed prior to August 13, 1993, the effective date of the 1993 amendment to this section and to § 5-4-104. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Acts 1993, No. 192 amended subdivision (a)(1)(F) of this section and former § 5-4-104(e)(1)(F) to remove the language from the two statutes which prohibited trial courts from imposing suspended imposition of sentence or probation of controlled substance offenders; the act does not provide for retroactive application, and, thus, its operation is prospective only. *State v. Whale*, 314 Ark. 576, 863 S.W.2d 290 (1993); *State v. Williams*, 315

Ark. 464, 868 S.W.2d 461 (1994); *State v. Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994).

The fact that Acts 1993, No. 192, now codified as § 5-4-104(e)(1) and subdivision (a)(1) of this section, was approved before commission of the crime and effective after the crime did not require its application; the effective date of the act was controlling. *Elders v. State*, 321 Ark. 60, 900 S.W.2d 170 (1995).

Where the amendment to subsection (d)(2) was not in effect at the time a crime was committed, the circuit court had no jurisdiction to modify its original sentence. *Bagwell v. State*, 346 Ark. 18, 53 S.W.3d 520 (2001).

Acts 1999, No. 1569, effective April 15, 1999, amended subsection (d) to empower circuit courts to modify original sentences of suspension or probation, even though a judgment order has been entered; however, the court declined to apply the amendment retroactively. *Nimmer v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 13 (Jan. 7, 2004).

Entry of Conviction.

When the trial court placed the defendant on probation and imposed a fine of \$500.00 in the original cases, a valid judgment of conviction was entered. *Webb v. State*, 66 Ark. App. 367, 990 S.W.2d 591 (1999).

Fine.

A separate, unsatisfied, existing fine is not the sort of contemporaneous "fine" mentioned in subdivision (d)(1) of this section. *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994).

A sentence by a circuit court to pay a fine is put into execution when the judgment of conviction is entered. *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994).

Mandatory Sentences.

Since § 5-4-104(c) provides that a defendant convicted of a Class Y felony must be sentenced to imprisonment, a defendant convicted of such an offense could not be given a suspended sentence or probation even where the prosecutor agreed that some form of probation would be proper. *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

The circuit court erred by imposing a sentence of three years' supervised probation for possession of a controlled sub-

stance with intent to deliver, pursuant to § 16-93-501(10), where intent to deliver cocaine was a Class Y felony and a minimum sentence of 10 years was mandatory under a former version of subdivision (a)(1)(F) of this section and former § 5-4-104(e)(1)(F). *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994).

Where, at the time the offense was committed, § 5-64-407, former § 5-4-104(e)(1)(F) and a former version of subdivision (a)(1)(F) of this section prohibited probation for delivery (as opposed to possession) of a controlled substance, the trial court erred in placing defendant on probation. *State v. Landis*, 315 Ark. 681, 870 S.W.2d 704 (1994); *State v. Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994).

Mitigating Circumstances.

It was not improper for the trial court to refuse to allow defendant's psychiatrist to testify to the jury, as to a mitigating circumstance, since this section leaves mitigating circumstances for the consideration of the sentencing court, even though § 5-4-103 provides that the jury shall fix punishment. *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981).

The jury has no authority to grant probation; therefore, questions of mitigation are properly presented to the court which has the responsibility of sentencing after the maximum punishment is fixed by the jury. *Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984).

Modification.

The provisions of subdivision (d)(1) of this section mean that a guilty plea, a fine, and suspension of imposition of sentence amount to a conviction, which, in turn, entails execution; this precludes a court from proceeding under the auspices of § 5-4-306(b). *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994).

By enacting Acts 1999, No. 1569, the legislature specifically intended to overturn prior case law and empower trial courts to use intermediate sanctions in probation revocations and to modify original sentences where appropriate; thus, the trial court was within its jurisdiction to modify defendant's original order by its second revocation order. *Moseley v. State*, 349 Ark. 589, 80 S.W.3d 325 (2002).

1999 Ark. Acts 1569 was not in effect at the time defendant's original crime was

committed and could not be invoked by the State to apply to the facts of defendant's case; defendant committed the offense and his sentence was put into execution prior to the effective date of the provisions of the act and, for that reason, the act did not apply because the original charge was committed prior to April 15, 1999, such that defendant's plea of guilty, coupled with a fine and probation, constituted a conviction, thereby depriving the trial court of subject matter jurisdiction to amend or modify his original sentence that had been executed. *Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003).

Where defendant was sentenced in 1998 to four years' imprisonment and six years' suspended sentence upon his conviction for delivery of cocaine, the circuit court erred by later revoking his suspended sentence and imposing a new sentence because the circuit court did not have the authority to modify defendant's sentence. *Nimmer v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 13 (Jan. 7, 2004).

Trial court possessed jurisdiction to modify the original probationary term and return defendant to his probationary status where defendant was placed on probation for possession of marijuana and for writing bad checks; both crimes were alleged to have been committed after the effective date of Acts 1999, No.1569. *Hatton v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 23 (Jan. 12, 2005).

Suspension of Sentence.

When a defendant is convicted of a Class Y felony, the General Assembly has specifically provided that a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

Under Ark. Code Ann. § 5-4-401(a)(1), a defendant convicted of a Class Y felony had to be sentenced to a term of not less than 10 years nor more than 40 years, or life; defendant's conviction for simultaneous possession of drugs and a firearm constituted a Class Y felony for which no part of her sentence could be suspended pursuant to Ark. Code Ann. § 5-4-

301(a)(1)(C); therefore, the trial court erred when it suspended 7 years of her 10-year sentence. *State v. Hardiman*, 353 Ark. 125, 114 S.W.3d 164 (2003).

Under subdivision (a)(1)(F), the trial court lacked statutory authority to suspend imposition of defendant's 20-year sentence for delivery of cocaine upon defendant's guilty plea in 1991 and the judgment was facially invalid, thus, the 20-year sentence that petitioner was currently serving (upon the revocation of the suspended sentence in 1998), was illegal; however, an illegal sentence could be corrected and remand for resentencing was proper. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

Where defendant pleaded guilty to delivery of a controlled substance and possession of a controlled substance, and the former sentence was suspended and the latter sentence was imposed and served, and where suspension of the delivery offense was illegal pursuant to this section, it did not result in unauthorized dual judgments of sentence, making the suspended sentence void by operation of law, because the two sentences were separate and distinct. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

Cited: *Coleman v. State*, 15 Ark. App. 5, 688 S.W.2d 313 (1985); *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986); *Robinson v. Lockhart*, 823 F.2d 210 (8th Cir. 1987); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989); *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989); *Howard v. State*, 301 Ark. 281, 783 S.W.2d 61 (1990); *Pennington v. State*, 305 Ark. 507, 808 S.W.2d 780 (1991); *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991); *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992); *Robinson v. State*, 41 Ark. App. 20, 847 S.W.2d 49 (1993); *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Jones v. State*, 54 Ark. App. 150, 924 S.W.2d 470 (1996); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998); *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001); *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003); *Rickenbacker v. Norris*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 198 (Mar. 31, 2005).

5-4-302. Effect of noncode statutes.

When a defendant who pleads or is found guilty of an offense defined by a statute not a part of the Arkansas Criminal Code is eligible for suspension or probation pursuant to that statute, the court may make any disposition permitted by that statute.

History. Acts 1975, No. 280, § 1202; A.S.A. 1947, § 41-1202.

Meaning of "Arkansas Criminal Code". See note at § 5-1-101.

CASE NOTES

Cited: Pennington v. State, 305 Ark. 507, 808 S.W.2d 780 (1991).

5-4-303. Conditions of suspension or probation.

(a) If a court suspends imposition of sentence on a defendant or places him or her on probation, the court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.

(b) The court shall provide as an express condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation.

(c) If the court suspends imposition of sentence on a defendant or places him or her on probation, as a condition of its order the court may require that the defendant:

(1) Support his or her dependents and meet his or her family responsibilities;

(2) Work faithfully at suitable employment;

(3) Pursue a prescribed secular course of study or vocational training designed to equip him or her for suitable employment;

(4) Undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for medical or psychiatric treatment;

(5) Participate in a community-based rehabilitative program or work-release program that meets the minimum state standards for certification and for which the court may impose a reasonable fee or assessment on the defendant to be used in support of the community-based rehabilitative program or work-release program;

(6) Refrain from frequenting an unlawful or designated place or consorting with a designated person;

(7) Have no firearm in his or her possession;

(8) Make restitution to an aggrieved party in an amount the defendant can afford to pay for the actual loss or damage caused by his or her offense;

(9) Post a bond, with or without surety, conditioned on the performance of a prescribed condition; and

(10) Satisfy any other condition reasonably related to the rehabilitation of the defendant and not unduly restrictive of his or her liberty or incompatible with his or her freedom of conscience.

(d) Following a revocation hearing held pursuant to § 5-4-310 and in which a defendant has been found guilty or has entered a plea of guilty or nolo contendere, the court may:

(1) Continue the period of suspension of imposition of sentence or continue the period of probation;

(2) Lengthen the period of suspension or the period of probation within the limits set by § 5-4-306;

(3) Increase the fine within the limits set by § 5-4-201;

(4) Impose a period of confinement within the limits set by § 5-4-304; or

(5) Impose any conditions that could have been imposed in the original order.

(e) If the court places a defendant on probation, as a condition of its order the court may require that the defendant:

(1) Report as directed to the court or the probation officer and permit the probation officer to visit the defendant at the defendant's place of employment or elsewhere;

(2) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer; and

(3) Answer any reasonable inquiry by the court or the probation officer and promptly notify the court or probation officer of any change in address or employment.

(f) Following a revocation hearing in which a defendant continues on a period of suspension or a period of probation, nothing prohibits the court upon finding the defendant guilty at a subsequent revocation hearing from:

(1) Revoking the suspension or period of probation; and

(2) Sentencing the defendant to incarceration in the Department of Correction.

(g) If the court suspends imposition of sentence on a defendant or places him or her on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he or she is being released.

(h)(1)(A) If the court suspends imposition of sentence on a defendant or places him or her on probation conditioned upon his or her making restitution under subdivision (c)(8) of this section, the court, by concurrence of the victim, defendant, and the prosecuting authority, shall determine the amount to be paid as restitution.

(B) After considering the assets, financial condition, and occupation of the defendant, the court shall further determine:

(i) Whether restitution shall be total or partial;

(ii) The amounts to be paid if by periodic payments; and

(iii) If a personal service is contemplated, the reasonable value and rate of compensation for the personal service rendered to the victim.

(2) If the court has suspended imposition of sentence or placed a defendant on probation conditioned upon the defendant making restitution and the defendant has not satisfactorily made all of his or her payments when the probation period has ended, the court may:

(A) Continue to assert the court's jurisdiction over the recalcitrant defendant; and

(B) Either:

(i) Extend the probation period as the court deems necessary; or

(ii) Revoke the defendant's suspended sentence.

(i)(1) In a case in which counsel has been appointed to represent a defendant due to the defendant's indigency and the court suspends imposition of sentence or places a defendant on probation at the time of disposition, the court shall revisit the issue of the defendant's indigency.

(2)(A) When appropriate and when the defendant is financially able to do so, the court may assess an attorney's fee to be paid by the defendant as part of his or her suspension or probation.

(B) The amount of the assessed attorney's fee should be commensurate with the defendant's ability to pay.

(C) The assessed attorney's fee shall be paid to the state as a means of partial reimbursement for providing appointed counsel.

(3) In no event is failure to pay an assessed attorney's fee, standing alone, a ground for the revocation of a suspension or probation.

(4)(A) The assessed attorney's fee under subdivision (i)(2) of this section shall be collected by the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court or district court of this state.

(B) On or before the tenth day of each month, the county or city official, agency, or department described in subdivision (i)(4)(A) of this section shall remit any assessed attorney's fee collected to the Arkansas Public Defender Commission on a form provided by the commission.

(C) The commission shall deposit the money collected into a separate account within the State Central Services Fund to be known as "Public Defender Attorney Fees" to be used solely to defray costs for the commission.

(j) If a court places a defendant on probation conditioned upon his or her paying supervision fees and the defendant has not satisfactorily made all of his or her payments when the probation period has ended, the court may:

(1) Continue to assert the court's jurisdiction over the defendant; and

(2) Extend the probation period as the court deems necessary.

History. Acts 1975, No. 280, § 1203; 1977, No. 474, §§ 3, 9; 1977, No. 482, § 3; 1985, No. 315, § 1; A.S.A. 1947, § 41-1203; Acts 1989, No. 305, § 1; 1993, No. 119, § 1; 1997, No. 281, § 1; 1999, No. 231, § 1; 1999, No. 1564, § 6; 1999, No. 1569, § 2; 2003, No. 1765, § 1.

A.C.R.C. Notes. Pursuant to § 1-2-207, subsection (g) of this section is set out above as amended by Acts 1999, Nos. 213, 1564, and 1569. Subsection (g) of this

section was also amended by Acts 1999, No. 1081, to read as follows: "(g) In cases where the counsel has been appointed to represent a defendant due to his indigency and if the court suspends the imposition of sentence or places a defendant on probation at the time of disposition, the court may revisit the issue of the defendant's indigency. Where appropriate, and where the defendant is financially able to do so, the court may assess an attorney's

fee to be paid by the defendant as part of his suspended or probated sentence. The amount of the fee assessed should be commensurate with the defendant's ability to pay. The fee assessed shall be paid to the state as a means of partial reimbursement for providing appointed counsel. In no event shall failure to pay the assessed attorney's fees, standing alone, be grounds for the revocation of the suspended sentence or probated sentence. Any money collected pursuant to this sub-

section shall be remitted on or before the tenth (10th) day of the month following the month of collection to the Department of Finance and Administration, Administration of Justice Fund Section, for deposit in the State Administration of Justice Fund."

Amendments. The 2003 amendment inserted "or her" in (i)(1) and present (i)(2)(A); and rewrote present (i)(4).

Cross References. Payment of the supervision fee by the offender, § 16-93-104.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 885.

CASE NOTES

ANALYSIS

In general.

Appeal.

Community service.

Explanation of conditions.

Modification.

Rehabilitation program.

Restitution or reparation.

Sentence upon revocation of suspension.

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Unauthorized sentence.

Validity of conditions.

Written notice.

In General.

This section is available to the trial courts if deemed just and proper. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

An "alias bench warrant" did not meet the requirements of former § 5-4-309(e) because such a warrant was not issued for an arrest due to violation of probation under subdivision (h)(2) of this section (former subsection (f)); however, under subdivision (h)(2), which was adopted after § 5-4-309, the trial court retained jurisdiction to revoke defendant's probation, even beyond the expiration of defendant's probation period in 2000, where defendant had failed to pay the full amount of required restitution. *Smith v. State*, 83 Ark. App. 48, 115 S.W.3d 820 (2003).

Appeal.

Where defendant was tried for assault on a family member and felon in possession of a firearm, at no time did defendant

raise the issue at trial that the State had failed to provide defendant with a written list of the conditions of defendant's probation on a prior conviction such that defendant's probation could not be revoked; thus, the issue was waived on appeal, and in any event, defendant had stipulated that the new charges would constitute grounds for revocation and there was no error in revoking defendant's probation. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Community Service.

Where the written notice of the terms of probation provided to the defendant indicated that he was to perform 100 hours of community service, but did not explicitly impose a deadline earlier than the completion of his period of probation, such a condition imposed by the probation office was invalid. *Wade v. State*, 64 Ark. App. 108, 983 S.W.2d 147 (1998).

Explanation of Conditions.

Where defendant had been clearly advised in open court what was expected of him for him to remain on probation, there was substantial compliance with the requirement he be explicitly advised of his conditions of probation and not prejudiced in any way; and while the record did not reflect that defendant ever had a conference with probation officials, or that defendant actually received documents articulating the conditions of his probation, this omission did not vitiate his suspended sentence and probation. *Thornton*

v. State, 267 Ark. 675, 590 S.W.2d 57 (Ct. App. 1979).

All conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revocable; therefore, courts have no power to imply and subsequently revoke conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence. *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980).

Where the trial court failed to expressly condition the appellant's suspended sentence as required by statute, the trial court lacked the authority to revoke his suspended sentence on the basis of a violation of an implied condition that the defendant maintain good behavior and refrain from criminal conduct. *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980).

This section and § 16-90-106 clearly show that the defendant is entitled to know the effect of his sentence, and the trial court was held not to have performed this function. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

Where defendant was not given written statement of conditions for release but was merely told that suspension was during good behavior, the trial court erred in revoking defendant's suspended sentence, on the basis that the state had failed to produce any proof that appellant had any knowledge of the conditions of suspension or probation. *Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983).

The requirement in subsection (e) is only a procedural matter which, if not complied with, constitutes reversible error, but in no wise ousts the jurisdiction of the court; like all other procedural errors for which reversal on appeal might be based, it may be waived by failure to assert it. *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

Modification.

Since court retains jurisdiction of a case when it suspends imposition of sentence, it also has power to modify conditions of a suspension; thus, the court is authorized to modify the conditions which are imposed when the imposition of sentence is suspended, or to impose additional conditions, as long as the conditions are changed as authorized by this section.

Palmer v. State, 31 Ark. App. 97, 788 S.W.2d 248 (1990).

By enacting Acts 1999, No. 1569, the legislature specifically intended to overturn prior case law and empower trial courts to use intermediate sanctions in probation revocations and to modify original sentences where appropriate; thus, the trial court was within its jurisdiction to modify defendant's original order by its second revocation order. *Moseley v. State*, 349 Ark. 589, 80 S.W.3d 325 (2002).

Rehabilitation Program.

Where the suspended sentence was expressly conditioned upon the successful completion of the drug rehabilitation program, but where defendant did not complete the program, and there was no showing that defendant was arbitrarily dismissed from the program, then the trial judge could justifiably find by a preponderance of the evidence that the defendant had failed to comply with a condition of his suspension or probation. *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980).

Restitution or Reparation.

Subdivision (c)(8) is aimed at allowing an accused to remain out of prison so long as satisfactory payments of restitution are being made; immediate imprisonment would thwart such intent. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

If the court suspends the imposition of sentence or places defendant on probation conditioned upon making restitution as provided by this section, payment must be in an amount the defendant can afford to pay and the victim, defendant, and prosecuting attorney must agree on the amount. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

A circuit court retains jurisdiction over a defendant who has been ordered to pay restitution as a condition of a deferred imposition of sentence until the restitution has been paid in full, even beyond the duration of deferment. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

The "shall" in subsection (f) of this section indicates that the court's jurisdiction automatically continues until the restitution is complete; moreover, the disjunctive "or" gives the court the option to either extend the probation period or revoke the suspended sentence. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

Defendant's argument that, under this section he had to agree to the amount of restitution before it was imposed by the court, was meretless; the statute simply provided that the court could set the amount of restitution if the victim, defendant, and prosecuting attorney agree to allowed the court to do so. *Tumlison v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 781 (Nov. 9, 2005).

Sentence Upon Revocation of Suspension.

Where defendant was sentenced to period of imprisonment for one year and any additional term of imprisonment for a period of up to five years was suspended, imposition of nine year sentence upon revocation of suspension when court found defendant, subsequent to his release committed the crime of robbery was proper since 10 years is the maximum for the crime for which he was placed on suspension. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

The court did not have the power to revoke defendant's suspended sentence prior to the commencement of the suspension period. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Suspension or Probation.

After release from prison an inmate is on probation under supervision of the Department of Correction; the distinction between suspension and probation is whether supervision is exercised, and that is the reason the statutes prohibit a court from sentencing a defendant to a term in prison and following it by a period of probation. Section § 5-4-104(e)(3) appears to allow a period of suspension following a term in prison. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

Subsection (f) did not authorize the trial court to extend defendant's probation for his failure to pay the fine and costs; subsection (f) only applies to defendants ordered to pay restitution or reparations. *Jones v. State*, 54 Ark. App. 150, 924 S.W.2d 470 (1996).

Unauthorized Sentence.

Where after the defendant entered a guilty plea to class C felony theft of property, for which the maximum sentence is 10 years, a sentence of 6 years in prison, with 2 years suspended on condition that the defendant pay the sum of \$135,000 at

the rate of \$200 per month, beginning 60 days after defendant's release from prison, and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not authorized. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

Validity of Conditions.

Conditions for probation will be upheld if they bear a reasonable relationship to the crime committed or to future criminality; therefore, certain conditions imposed upon a defendant held valid; however, other conditions imposed upon defendant were held to be too broad, vague and insufficiently tailored to bear a reasonable relationship to probation/suspension objectives of rehabilitation and future criminality. *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986).

Written Notice.

Nothing in this section requires that the defendant be informed in writing that he is subject to a sentence greater than the probationary period imposed. *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ct. App. 1980).

Although this section requires that a defendant be given a written statement specifically setting forth the conditions of his suspended sentence, this procedural right, like any other, may be waived. *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987).

Subsection (e) did not apply where defendant's probation period was merely extended to allow her to pay the restitution at a rate she indicated that she could afford. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

The authority to enforce the terms of a suspended sentence is not itself a condition of the suspended sentence and is not required to be stated in writing. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

Defendant's suspended sentence could not be revoked when he never received any written conditions of his suspended sentence as required by this section. *Zollicoffer v. State*, 55 Ark. App. 166, 934 S.W.2d 939 (1996).

Revocation of the defendant's probation was not improper because he was not

given written notice of the terms of probation in a 1998 order which superseded an original 1996 order of probation, since the defendant's probation was revoked on the basis of a violation of probationary terms contained in the 1996 probation order, which he acknowledged receiving. *Morgan v. State*, 72 Ark. App. 482, 37 S.W.3d 684 (2001).

Despite the fact that an order suspending defendant's sentence for theft of property and residential burglary did not specifically state that defendant was required to surrender to police on a certain date in order to serve jail time, the preponderance of the evidence showed that defendant's failure to report violated the provisions of the order that required good behavior and

a law-abiding lifestyle; evidence showed that defendant was caught after leading police on a chase. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

Cited: *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977); *Cogburn v. State*, 264 Ark. 173, 569 S.W.2d 658 (1978); *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979); *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979); *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983); *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987); *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989); *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994); *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998).

5-4-304. Confinement as condition of suspension or probation.

(a) If a court suspends the imposition of sentence on a defendant or places him or her on probation, the court may require as an additional condition of its order that the defendant serve a period of confinement in the county jail, city jail, or other authorized local detentional, correctional, or rehabilitative facility at any time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.

(b) An order that the defendant serve a period of confinement as a condition of suspension or probation is not deemed a sentence to a term of imprisonment, and a court does not need to enter a judgment of conviction before imposing a period of confinement as a condition of suspension or probation.

(c) Following a revocation hearing held pursuant to § 5-4-310 and in which a finding of guilt has been made or a defendant has entered a plea of guilty or nolo contendere, a court may add a period of confinement to be served during the period of suspension of imposition of sentence or period of probation.

(d)(1)(A) The period actually spent in confinement pursuant to this section in a county jail, city jail, or other authorized local detentional, correctional, or rehabilitative facility shall not exceed:

- (i) One hundred twenty (120) days in the case of a felony; or
- (ii) Thirty (30) days in the case of a misdemeanor.

(B) In the case of confinement to a facility in the Department of Community Correction, the period actually spent in confinement under this section shall not exceed three hundred sixty-five (365) days.

(2) For purposes of this subsection, any part of a twenty-four-hour period spent in confinement constitutes a day of confinement.

(e) If the suspension or probation of a defendant is subsequently revoked and the defendant is sentenced to a term of imprisonment, the

period actually spent in confinement pursuant to this section shall be credited against the subsequent sentence.

History. Acts 1975, No. 280, § 1204; A.S.A. 1947, § 41-1204; Acts 1993, No. 532, § 6; 1993, No. 550, § 6; 1999, No. 1569, § 3; 2003, No. 1742, § 1; 2005, No. 1443, § 1.

Amendments. The 2003 amendment rewrote (d)(1).

The 2005 amendment deleted "if no period of confinement was included in the original order placing the defendant on suspended imposition of sentence or probation" from the end of (c).

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 885.

CASE NOTES

ANALYSIS

Purpose.

Applicability.

Credit for time served.

Dual judgments.

Illegal sentence.

Imprisonment and probation or suspension.

Jurisdiction.

Purpose.

This section was intended merely as an alternative method of sentencing, for § 5-4-301(d) contains two specific exceptions to the general rule that a judgment of conviction is not to be entered against one who is placed on suspension or probation. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

This section was not intended as a limitation on the authority to enter a judgment of commitment to a term in the Department of Correction followed by a period of suspended imposition, but merely as a discretionary alternative to other authorized sentences. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Applicability.

This section provides for the placing of a defendant in a county or city jail with conditions of probation, and does not apply to a term of imprisonment at the Department of Correction. *Marion v. State*, 4 Ark. App. 359, 631 S.W.2d 315 (1982).

This section has application only to those criminal defendants upon whom im-

position of sentence is suspended entirely. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Where defendant's crimes were committed prior to the effective date of subsection (c) of this section, its provisions were not applicable to defendant's probation revocation hearing; accordingly, the trial court committed error when it found that defendant had violated the terms of his probation and added an additional condition thereon because, after imposition of the original sentence, the court lost jurisdiction to amend or modify the sentence. *Climer v. State*, 80 Ark. App. 281, 95 S.W.3d 11 (2003).

Credit for Time Served.

Where a court of appeals was unable to find anything in the abstract of pleadings and testimony to indicate that a defendant had actually served the jail time to which he was sentenced as part of a suspended prison sentence, the court held that the defendant had not demonstrated his entitlement to credit for the time. *Coleman v. State*, 15 Ark. App. 5, 688 S.W.2d 313 (1985).

On direct appeal, a defendant could not raise the issue of the failure of the trial court to grant credit for time already served pursuant to subsection (a) where he failed to raise the issue in the trial court below; however, he could raise the issue in a petition filed with the circuit court under Ark. R. Crim. P. Rule 37. *Morgan v. State*, 73 Ark. App. 107, 42 S.W.3d 569 (2001).

Dual Judgments.

When a court grants unauthorized dual judgments of sentence and one is imposed and served, and the other is the suspension of a sentence, there is an election by operation of law and the sentencing court has elected to order the sentence actually imposed; the other is void. *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983).

Illegal Sentence.

Defendant's sentence was illegal because, as a condition of his probation, the court confined him to the county jail for a term in excess of that allowed by this section. *Gage v. State*, 307 Ark. 285, 819 S.W.2d 279 (1991).

Defendant's sentence of 20 years imprisonment, suspended to an additional term of 20 years, pursuant to his guilty plea to one count of manufacturing methamphetamine, and two counts of possession of drug paraphernalia, was modified to provide that defendant was no longer required to report to a supervising officer, as the sentence was actually one of probation rather than suspension, which was a sentence specifically prohibited by statute. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Imprisonment and Probation or Suspension.

While it is true that § 5-4-104(e) provides that a defendant cannot be sentenced to a term of imprisonment to be followed by a period of probation otherwise than in accordance with this section, a court has the authority to sentence one to a term of imprisonment to be followed

by a period of suspension. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

A trial court may not impose a sentence of imprisonment in the state Department of Correction that is followed by probation. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992).

Nothing in this section prohibited the trial court from revoking probation and imposing any sentence which might have originally been imposed; thus, defendant's sentence of 90 days in the county jail with 90 days credit as a period of confinement in the trial court's original order of probation did not preclude the court from ordering six years imprisonment following the state's second petition for revocation and a finding of guilt on the part of the defendant for violating his probation. *Moseley v. State*, 349 Ark. 589, 80 S.W.3d 325 (2002).

Jurisdiction.

The procedure provided for in subsection (a) of this section may be accomplished only when the suspension of imposition of sentence is given effect; a trial court loses jurisdiction to modify or amend the original sentence once a valid sentence is put into execution. *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994).

Cited: *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987); *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988); *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989); *Palmer v. State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990); *Bilderback v. State*, 319 Ark. 643, 893 S.W.2d 780 (1995); *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998).

5-4-305. Effect on appeal.

(a) If a court suspends imposition of sentence on a defendant or places him or her on probation, the fact that a judgment of conviction is not entered does not preclude:

- (1) An appeal on the basis of any error in the adjudication of guilt or any error in the entry of the order of the suspension or probation; or
- (2) The imposition of any costs authorized by law.

(b) An appeal following a suspension or probation may be taken by filing notice of appeal in the manner prescribed by law within thirty (30) days after the docket entry of the suspension or probation.

History. Acts 1975, No. 280, § 1211; A.S.A. 1947, § 41-1211.

5-4-306. Time period generally — Modification.

(a)(1) If a court suspends imposition of sentence on a defendant or places him or her on probation, the period of suspension or probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged.

(2) The court may discharge the defendant at any time.

(b) During a period of suspension or probation, upon the motion of a probation officer or a defendant or upon the court's own motion, a court may:

(1) Modify a condition imposed on the defendant;

(2) Impose an additional condition authorized by § 5-4-303;

(3) Impose an additional fine authorized by §§ 5-4-201 and 5-4-303;

or

(4) Impose a period of confinement authorized by § 5-4-304.

History. Acts 1975, No. 280, § 1205; 1977, No. 772, § 1; A.S.A. 1947, § 41-1205; Acts 1999, No. 1569, § 4.

CASE NOTES

ANALYSIS

Applicability.

Misdemeanor conviction.

Modification of conditions.

Suspension of sentence.

Applicability.

The provisions of § 5-4-301(d)(1) mean that a guilty plea, a fine, and suspension of imposition of sentence amount to a conviction, which, in turn, entails execution; this precludes a court from proceeding under the auspices of subsection (b) of this section. *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994).

Imposition of a sentence of probation can not exceed the maximum jail time allowable for the offense charged; thus, the trial court did not have the authority to place defendant on supervised probation for 36 months where his maximum sentence in jail was one year. *Hamm v. State*, 75 Ark. App. 358, 57 S.W.3d 252 (2001).

Misdemeanor Conviction.

Where defendant was convicted of two counts of misdemeanor possession of marijuana, and was sentenced to 18 months probation, his sentence violated § 5-4-403(c)(2) which provides that the aggregate of consecutive terms for misdemeanors shall not exceed one year; the one year

maximum is applicable to the defendant's probationary sentence by virtue of subsection (a) of this section. *Brunson v. State*, 45 Ark. App. 161, 873 S.W.2d 562 (1994).

Modification of Conditions.

Where original order only suspended imposition of sentence as to imprisonment and did not suspend imposition of fine, modification was not covered by subsection (b). *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989).

Suspension of Sentence.

Where after defendant pleaded guilty to a charge of theft, a class C felony for which the maximum sentence is 10 years, the court could sentence defendant to one year of imprisonment and suspend imposition of an additional sentence to the penitentiary for a period of five years, since the five year period of suspension did not exceed the maximum prison sentence allowable for the offense. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Where after the defendant entered a guilty plea to class C felony theft of property, for which the maximum sentence is 10 years, a sentence of 6 years in prison, with 2 years suspended on condition that the defendant pay the sum of \$135,000 at the rate of \$200 per month, beginning 60 days after defendant's release from

prison, and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not authorized. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

Cited: *Walker v. State*, 263 Ark. 485, 565 S.W.2d 605 (1978); *Palmer v. State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990).

Harness v. State, 352 Ark. 335, 101 S.W.3d 235 (2003).

5-4-307. Time period — Calculation.

(a) Except as provided in subsection (c) of this section, a period of suspension or probation commences to run on the day it is imposed.

(b)(1) Whether imposed at the same or a different time, multiple periods of suspension or probation run concurrently.

(2) The period of a suspension or probation also runs concurrently with any federal or state term of imprisonment or parole to which a defendant is or becomes subject to during the period of the suspension or probation.

(c) If a court sentences a defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment.

History. Acts 1975, No. 280, § 1206; A.S.A. 1947, § 41-1206.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 885.

CASE NOTES

ANALYSIS

In general.

Commencement of sentence.

Probation.

In General.

This section reduced the prior law to exactness in the matter of when a suspended sentence commences to run upon release from a period of confinement, and although it is included in the Arkansas Rules of Criminal Procedure, it is not a new manner of computing the running time but clarifies the law as it existed prior to enactment of the Arkansas Criminal Code. *Matthews v. State*, 265 Ark. 298, 578 S.W.2d 30 (1979).

The court did not have the power to revoke defendant's suspended sentence prior to the commencement of the suspension period. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Although a suspended sentence for escape had probably expired prior to the

date of a revocation hearing, defendant was not entitled to relief because a motion to supplement the record to add the date of release was denied; the evidence was never presented to the trial court prior to the entry of judgment. *Rameriz v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 448 (June 8, 2005).

Commencement of Sentence.

The trial court had authority to revoke suspended sentence for violation occurring prior to the commencement of the suspension period. *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989).

The suspended four and one-half year portion of defendant's sentence began to run on the day that he was released from the Department of Correction. *Lyons v. State*, 35 Ark. App. 29, 813 S.W.2d 262 (1991).

Trial court had authority to revoke a suspended sentence imposed for residential burglary because the sentence com-

menced on the day it was rendered, despite the fact that defendant was ordered to serve a term of imprisonment on the same day. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

Where defendant was sentenced to prison plus a suspended sentence for an additional term, but defendant violated the conditions of her suspended sentence before she served any of her prison sentence, the portion of the trial court's order that imposed an unauthorized twenty-year prison term was reversed; a trial court does not have the authority to revoke a suspended sentence before the commencement of the period of suspension and, in such instances, the resulting sentence is void. *Stultz v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 560 (Sept. 7, 2005).

Probation.

Where the defendant was sentenced on two charges of theft of property and burglary, receiving a 6-year term of imprisonment for theft of property and another 6-year term for burglary, to run consecutively to the theft, and the court then ordered that execution of the sentence of the burglary term be suspended, placing the defendant on probation for 6 years, the court erred in running his probation consecutively to his term of imprisonment. *Hendrix v. State*, 291 Ark. 134, 722 S.W.2d 596 (1987).

Cited: *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985); *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996); *Bramucci v. State*, 76 Ark. App. 8, 62 S.W.3d 10 (2001); *Byrd v. State*, 84 Ark. App. 203, 138 S.W.3d 109 (2003).

5-4-308. Transfer of jurisdiction.

(a) If a defendant during a period of probation goes from a county where he or she is being supervised to another county, jurisdiction over the defendant may be transferred in the discretion of the supervising court to a court of comparable jurisdiction in the other county if the court in the other county concurs.

(b) If jurisdiction over a defendant is transferred pursuant to subsection (a) of this section, the court in the county to which jurisdiction is transferred has any power with respect to the defendant that was previously possessed by the transferring court.

(c) The procedure under this section may be repeated if a defendant goes from the county where he or she is being supervised to another county during the period of his or her probation.

History. Acts 1975, No. 280, § 1207; A.S.A. 1947, § 41-1207.

5-4-309. Violation of conditions — Arrest, revocation, and sentencing.

(a)(1) At any time before the expiration of a period of suspension or probation, a court may summon a defendant to appear before it or may issue a warrant for the defendant's arrest.

(2) The warrant may be executed by any law enforcement officer.

(b) At any time before the expiration of a period of suspension or probation, any law enforcement officer may arrest a defendant without a warrant if the law enforcement officer has reasonable cause to believe that the defendant has failed to comply with a condition of his or her suspension or probation.

(c) A defendant arrested for violation of suspension or probation shall be taken immediately before the court that suspended imposition

of sentence, or if the defendant was placed on probation, before the court supervising the probation.

(d) If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

(e) A court may revoke a suspension or probation subsequent to the expiration of the period of suspension or probation if before expiration of the period:

(1) The defendant is arrested for violation of suspension or probation;

(2) A warrant is issued for the defendant's arrest for violation of suspension or probation;

(3) A petition to revoke the defendant's suspension or probation has been filed if a warrant is issued for the defendant's arrest within thirty (30) days of the date of filing the petition; or

(4) The defendant has been:

(A) Issued a citation in lieu of arrest under Rule 5 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation; or

(B) Served a summons under Rule 6 of the Arkansas Rules of Criminal Procedure for violation of suspension or probation.

(f)(1)(A) If a court revokes a suspension or probation, the court may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty.

(B) However, any sentence to pay a fine or of imprisonment, when combined with any previous fine or imprisonment imposed for the same offense, shall not exceed the limits of § 5-4-201 or § 5-4-401, or if applicable, § 5-4-501.

(2)(A) As used in this subsection, "any sentence" includes the extension of a period of suspension or probation.

(B) If an extension of suspension or probation is made upon revocation, the court is not deprived of the ability to revoke the suspension or probation again should the defendant's conduct warrant revocation again.

History. Acts 1975, No. 280, § 1208; A.S.A. 1947, § 41-1208; Acts 1999, No. 847, § 1; 2003, No. 841, § 1; 2005, No. 1534, § 1.

Publisher's Notes. The Court held in *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980), that subsection (f) of this section was partially repealed by implication by the 1979 amendment to § 16-93-402.

Amendments. The 2003 amendment inserted the subdivision (1) and (2) designations in (e); added "before expiration of the period" in present introductory language of (e); added (e)(3); and made stylistic and gender neutral changes.

The 2005 amendment inserted present (e)(3); and redesignated former (e)(3) as present (e)(4).

RESEARCH REFERENCES

UALR L.J. Holt, Survey of Criminal Procedure, 3 UALR L.J. 198.

Survey — Criminal Procedure, 10 UALR L.J. 149.

CASE NOTES

ANALYSIS

Burden of proof.
Cause for revocation.
Court's authority.
Evidence.
Expiration of period.
Hearings.
Implied repeal.
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Proof.
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Burden of Proof.

In order to revoke probation or a suspension trial court has to find by a preponderance of the evidence, that the defendant inexcusably violated a condition of the probation or suspension. *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001).

Where defendant was convicted of a sex offense and registered as a sex offender in another state, and while living in Arkansas for five years he was convicted of breaking and entering and felony theft of property and was given suspended sentences, but all the while he failed to register as a sex offender as required by § 12-12-905(a)(2) of the Sex Offender Registration Act, § 12-12-901 et seq., his failure to register or report a change of address was a Class D felony, and the State met its burden of proving by a preponderance of the evidence that defendant violated a condition of his suspended sentences. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002).

Where evidence showed that a law enforcement officer saw a car stopped in a road in the middle of night in a high crime area, the officer saw the driver exchange something with another driver, the officer stopped one of the cars and smelled burnt marijuana, defendant was the only passenger in that car, during a consensual search of the car the officer found four baggies of marijuana packaged as if for sale, and the marijuana was in a location

accessible to defendant in the car, the state met its burden under subsection (d) of showing that defendant had violated a condition of his probation by the constructive possession of contraband. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

Cause for Revocation.

Where the defendant had failed to work all the hours that he was required to as a condition of suspension of his sentence, but both he and his wife had been sick or injured during much of that time, the violation was not inexcusable, and his suspended sentence should not have been revoked. *Cogburn v. State*, 264 Ark. 173, 569 S.W.2d 658 (1978).

The trial court did not err in taking into consideration, in revoking defendant's probation and suspended sentence, that defendant had been associating with a convicted felon, who was his first cousin and who was regarded as a member of his immediate family. *Cureton v. State*, 266 Ark. 1034, 589 S.W.2d 204 (Ct. App. 1979).

A conviction in municipal court for loitering, as well as a prior conviction for burglary, would constitute good cause to revoke probation. *Murphy v. State*, 269 Ark. 181, 599 S.W.2d 138 (1980).

Where the suspended sentence was expressly conditioned upon the successful completion of the drug rehabilitation program, but where defendant did not complete the program, and there was no showing that defendant was arbitrarily dismissed from the program, then the trial judge could justifiably find by a preponderance of the evidence that the defendant had failed to comply with a condition of his suspension or probation. *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980).

The state has an interest in punishment and deterrence and is justified in pursuing a revocation of probation and the sentencing of a probationer for nonpayment of a fine when the defendant has willfully failed to pay the fine or failed to make

bona fide efforts to do so. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay; if the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority; however if the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

Where the record revealed the state proved by a preponderance of the evidence that the defendant's failure to pay restitution to his theft victims was inexcusable, and was not due solely to his inability to make the restitution payments, the revocation of the defendant's suspended sentence was justified. *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

Where probationer failed to pay fines, restitution, court costs, and attorney's fees until after his arrest for probation violation and where probationer failed to report his change of address to the probation officer, the trial court was correct in finding that these were not de minimis excusable violations and revoking probation. *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985).

A suspension may be revoked if the court finds, by a preponderance of the evidence, that the defendant has "inexcusably" failed to comply with a condition of the suspension. *Standridge v. State*, 290 Ark. 150, 717 S.W.2d 795 (1986), overruled on other grounds, *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997).

A conviction in violation of probation warrants revocation even though the conviction may have been appealed. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

Where one of the conditions of the probation was that the defendant subject himself and his home to being searched, the defendant's refusal gave the officers "reasonable cause to believe that the defendant had failed to comply with a condition of his probation." Therefore, his

actual arrest, occurring a few minutes later, was not illegal. *Wilson v. State*, 25 Ark. App. 45, 752 S.W.2d 46 (1988).

Defendant inexcusably violated the terms of her probation where she admitted that she did not notify the probation officer of her change of address and that she purposely failed to report because she was "hiding out" from police. *Dority v. State*, 329 Ark. 631, 951 S.W.2d 559 (1997).

The fact that the defendant had been truant once, tardy twice and suspended for ten days from school, all within a period of less than a month, was sufficient proof of his lack of a good faith effort to obtain his high-school diploma or GED in violation of his probation. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998).

Nothing in this section prohibited the trial court from revoking probation and imposing any sentence which might have originally been imposed; thus, defendant's sentence of 90 days in the county jail with 90 days credit as a period of confinement in the trial court's original order of probation did not preclude the court from ordering six years' imprisonment following the state's second petition for revocation and a finding of guilt on the part of the defendant for violating his probation. *Moseley v. State*, 349 Ark. 589, 80 S.W.3d 325 (2002).

Despite the fact that an order suspending defendant's sentence for theft of property and residential burglary did not specifically state that defendant was required to surrender to police on a certain date in order to serve jail time, the preponderance of the evidence showed that defendant's failure to report violated the provisions of the order that required good behavior and a law-abiding lifestyle; evidence showed that defendant was caught after leading police on a chase. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004).

Where police found alcohol in defendant's car and he admitted to associating with a habitual offender, these two circumstances alone constituted evidence to find that defendant had failed to comply with the conditions of his suspended sentence. *Turner v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 465 (June 23, 2004).

Where evidence showed that defendant failed to pay restitution, attempted to flee

when a search warrant was being served, and associated with persons that attempted to dispose of drugs during the execution of the warrant, there were sufficient grounds to justify revoking his probation. *Sims v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 525 (June 29, 2005).

Trial court did not err in revoking defendant's probationary sentence based on a fight with another person in a gas station parking lot; defendant committed an aggravated assault under § 5-13-204(a)(1) by running over the victim with a car and there was no basis for reversal due to inconsistencies in the testimony. *Crutchfield v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 524 (June 29, 2005).

Court's Authority.

The fact that defendant was not arrested with a warrant for violation of his suspended sentence nor given formal notice of the time and place of the revocation hearing did not deprive the trial court of jurisdiction to hear the petition, nor void the trial court's action in revoking the suspended sentence. *Reynolds v. State*, 282 Ark. 98, 666 S.W.2d 396 (1984).

Where more than five years had passed since the defendant was given a suspended sentence of three years on the condition that he pay court costs and a fine, the trial court no longer had the authority to revoke the suspended sentence for the defendant's failure to pay the fine. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

Where defendant was sentenced to 10 years with 5 years suspended and was paroled from the penitentiary, the court held to have no authority to revoke that suspension more than five years later. *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

Whether there was sufficient evidence to support the trial court's finding that the defendant had violated conditions of her suspended imposition of sentence was purely a question which required resolution of the witnesses' credibility and was one within the sound discretion of the trial court. *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986).

Where, while the defendant was serving probation imposed by the court of one county, he was convicted of an unrelated

felony by the court of a second county, the court of the second county was without authority to revoke his probation; instead, the defendant should have been returned to the first county for a revocation hearing. *Gill v. State*, 290 Ark. 1, 716 S.W.2d 746 (1986).

Where revocation of probation did not occur until after the completion of the defendant's imposed sentence, the trial court could not sentence the defendant to serve additional time in prison. *Gautreaux v. State*, 22 Ark. App. 130, 736 S.W.2d 23 (1987).

This section does not require that one accused of violation of probation be summoned or arrested, only that he may be. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

The revocation of a suspension for a subsequent crime prior to conviction of that crime was not an abuse of discretion. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

The fact that a municipal court judgment is on appeal does not prevent the trial court from using it as a basis for revocation. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993).

Where defendant's suspended imposition of sentence had expired, and defendant's subsequent offense on which the revocation of the suspended sentence was based did not occur until nearly 4 years later, and although defendant allegedly had also violated the conditions of his suspension by failing to pay court-ordered restitution and costs, but the State presented no proof and the court made no findings on those allegations, then neither of the exceptions in subsections (e) and (f) to subsection (d) of this section were applicable, and the trial court was without authority to revoke the suspension. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996).

The court did not have the power to revoke defendant's suspended sentence prior to the commencement of the suspension period. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Although the trial court had the authority to revoke defendant's probation after the state's second request because it was based on a violation of a condition in the original probation order, the trial court exceeded its authority when it entered a three year suspended sentence, given the

interpretation of subdivision (f) of this section. *Thronebury v. State*, 85 Ark. App. 352, 154 S.W.3d 272 (2004).

Evidence.

Revocation of probation was not clearly against the preponderance of the evidence. *Morgan v. State*, 267 Ark. 28, 588 S.W.2d 431 (1979); *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990).

The trial court's finding that defendant had inexcusably failed to comply with the conditions of his probation and suspended sentence held not to be against the preponderance of the evidence. *Cureton v. State*, 266 Ark. App. 1034, 589 S.W.2d 204 (1979).

Finding that defendant had inexcusably failed to comply with the conditions of his probation held supported by a preponderance of the evidence. *Thornton v. State*, 267 Ark. 675, 590 S.W.2d 57 (Ct. App. 1979).

Ruling of trial court which revoked suspension of sentence was supported by a preponderance of the evidence, which is all that the law requires. *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (Ct. App. 1980).

Evidence sufficient to find that it was proper to revoke defendant's suspended sentence under this section. *Queen v. State*, 271 Ark. 929, 612 S.W.2d 95, cert. denied, 454 U.S. 903, 102 S. Ct. 502, 70 L. Ed. 2d 378 (1981); *Dunavin v. State*, 18 Ark. App. 178, 712 S.W.2d 326 (1986); *Palmer v. State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990).

Evidence sufficient to find that there was no error in a trial court's revocation of probation under subsection (d). *Brewer v. State*, 274 Ark. 38, 621 S.W.2d 698 (1981); *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989).

Trial court's decision that defendant inexcusably failed to comply with probation conditions was clearly against a preponderance of the evidence. *Baldrige v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990).

Evidence was sufficient to support the court's judgment that defendant's failure to pay was inexcusable. *Finn v. State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991).

Even if the defendant was badly influenced by other inmates of the county jail and fell victim to the excitement of their escape, he inexcusably failed to comply

with the conditions of suspended sentence where he committed third degree battery, rape, kidnapping, and escape from jail. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992).

Alleged sexual assault victim's prior sexual conduct completely irrelevant to the issue of the revocation of defendant's suspended sentences on prior, unrelated charges. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Although defendant's conviction required a finding of guilt beyond a reasonable doubt, revocation of prior suspended sentences required a finding based upon only a preponderance of the evidence; thus, based on the jury's finding of guilt, the judge's decision to revoke the suspension of sentence was supported by a preponderance of the evidence. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Evidence sufficient to prove by preponderance of the evidence that defendant violated his conditions of probation and suspension of sentence. *Greene v. State*, 324 Ark. 465, 921 S.W.2d 951 (1996).

Circumstantial evidence can be relevant to a revocation decision and may be sufficient to support revocation. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

The complete constructive-possession analysis does not apply to revocation proceedings; evidence sufficient for establishing possession in a revocation proceeding may be inadequate to establish a criminal conviction. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

Evidence that is insufficient to convict a person of the offense may be sufficient to revoke probation. *McKenzie v. State*, 60 Ark. App. 161, 961 S.W.2d 775 (1998).

Revocation upheld where the defendant's own testimony placed him in the stolen vehicle shortly before it was found within a block of his parents' home and the defendant went to Tennessee and stayed in a motel because he was aware the police were looking for him. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001).

Evidence showed that defendant violated at least one condition of his probation on drug charges and supported the trial court's order revoking defendant's probation and sentencing defendant to

prison. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003).

Evidence that is insufficient for a criminal conviction may be sufficient for revocation of probation or suspended sentence; thus, the burden on the state is not as great as in a revocation hearing. *Turner v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 465 (June 23, 2004).

Where victim testified that she was working at the hospital during the night shift when defendant, her supervisor, pushed her to the ground and raped her, the evidence of rape was sufficient to support revocation of defendant's probation; although the victim had difficulty identifying defendant at the rape trial because he changed his hairstyle, added facial hair, and gaining weight since the time of the rape, during the revocation proceeding the victim positively identified defendant as the rapist and the medical director for the hospital also recognized defendant in the courtroom. *Stewart v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 720 (Oct. 13, 2004).

Trial court did not err in revoking defendant's probation based on circumstantial evidence that he was in constructive possession of a firearm found in the trunk of a car in which he was a passenger as defendant admitted that he was going to deer camp and was wearing hunter-orange clothing and a jumpsuit. *Newborn v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 473 (June 15, 2005).

Expiration of Period.

Under the plain language of subsection (e), a warrant issued in 1990, during defendant's probationary period, but not served until 1995, after the expiration of defendant's probationary period, was not stale. *Richmond v. State*, 326 Ark. 728, 934 S.W.2d 214 (1996).

When defendant's probation period expired without her having been arrested for a probation violation and without an arrest warrant having been issued for violation of probation, the circuit court lost jurisdiction to revoke probation. *Carter v. State*, 350 Ark. 229, 85 S.W.3d 914 (2002).

The circuit court erred in not dismissing the petition for revocation where the probationary term had expired and the state failed to arrest the defendant or issue an arrest warrant during the period of proba-

tion as required by subsection (e) of this section. *Troup v. State*, 80 Ark. App. 323, 95 S.W.3d 823 (2003).

An "alias bench warrant" did not meet the requirements of former subsection (e) of this section because such a warrant was not issued for an arrest due to violation of probation under § 5-4-303(h)(2) (former § 5-4-303(f)); however, under § 5-4-303(h)(2), which was adopted after this section, the trial court retained jurisdiction to revoke defendant's probation, even beyond the expiration of defendant's probation period in 2000, where defendant had failed to pay the full amount of required restitution. *Smith v. State*, 83 Ark. App. 48, 115 S.W.3d 820 (2003).

Hearings.

Requirement that a suspension or revocation hearing be conducted within 60 days after arrest applies only to arrest for a revocation or suspension of a suspended sentence, not an arrest on another charge while defendant was allegedly serving a suspended sentence. *Walker v. State*, 262 Ark. 215, 555 S.W.2d 228 (1977). But see *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

The 60-day limitation for a revocation hearing provided by § 5-4-310(b) must also be applied to subsection (e) of this section in determining whether a defendant has been arrested for violation of the conditions of a suspended or probated sentence before the expiration of the period of the suspension or probation. *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

Compliance with this section and § 5-4-310 was sufficient where the defendant was not surprised by the timing of the hearing nor was he prejudiced in any way by not having been arrested or summoned. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

Implied Repeal.

Subsection (f) of this section was partially repealed by implication by a 1979 amendment to § 16-93-402 (since reamended), which provided that when a court revoked an offender's probation, it could require him to serve the sentence imposed or any lesser sentence which might have been originally imposed. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

Judicial Review.

In appeal from revocation of probation, defendant must show that court's finding that he violated the terms of his probation was clearly against the preponderance of the evidence. *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977).

A reviewing court will not overturn a decision in the trial court to grant a petition to revoke a suspended sentence unless it is clearly against the preponderance of the evidence. *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984); *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

To revoke probation, the burden is on the state to prove the violation of a condition of probation by a preponderance of the evidence, and on appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992).

Defendant could raise for the first time on appeal the issue that the revocation of his suspended sentence needed to be reversed because, *inter alia*, the period of suspension had expired. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996).

Jurisdiction.

Trial court did not have jurisdiction to revoke defendant's probation because the revocation occurred after the end of his probationary term and there were no circumstances allowing for revocation after the end of the probationary term; defendant was not arrested during the probation period for matters relating to his probation within the meaning of subsection (e) of this section. *Harris v. State*, 80 Ark. App. 181, 92 S.W.3d 690 (2002).

Notice.

There was no error in failure to give defendant written notice of the time and place of revocation hearing, in light of the fact that defendant did receive actual notice of the time and place of the hearing and did not ask for a continuance. *Reynolds v. State*, 282 Ark. 98, 666 S.W.2d 396 (1984).

Proof.

While revocation of a suspended sentence requires only a preponderance of the evidence, a conviction requires the finding of guilt beyond a reasonable doubt.

Ellerson v. State, 261 Ark. 525, 549 S.W.2d 495 (1977).

Since a defendant in a probation revocation proceeding is not being tried on a criminal charge where the defendant's guilt has to be established beyond a reasonable doubt, only a preponderance of the evidence is necessary to support a finding that the probationer has inexcusably breached a condition associated with his release resulting in a revocation order. *Thornton v. State*, 267 Ark. 675, 590 S.W.2d 57 (Ct. App. 1979).

In order to revoke a suspended sentence, the state must prove not only that a condition was violated but also that there was nothing that could be said to fairly excuse the violation; however, these factors need only be proved by a preponderance of the evidence. *Brown v. State*, 10 Ark. App. 387, 664 S.W.2d 507 (1984).

On a hearing to revoke a suspended sentence, the burden is upon the state to prove the violation of a condition by a preponderance of the evidence. *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984); *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

To revoke a suspended sentence, the state must prove by a preponderance of the evidence that the defendant violated a condition of her suspension. *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986).

The burden of proof does not shift; however, once the state has introduced evidence of nonpayment of restitution, the burden of going forward does shift to the defendant to offer some reasonable excuse for his failure to pay. To hold otherwise would place a burden upon the state which it could never meet; it would require the state, as part of its case in chief, to negate any possible excuses for nonpayment. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

A revocation of suspended sentence hearing is not a criminal prosecution and requires only the lowest showing of proof. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

The burden of proof on the State in a revocation hearing is to prove the violation of a condition of probation by a preponderance of the evidence; "reasonable doubt" has no application in revocation proceedings. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

Sentences.

Where part of terms of imprisonment was suspended during good behavior and it was ordered that the sentences in both convictions would run concurrently, the sentences were pronounced and only the execution of a portion of the sentences was suspended; thus, under these circumstances, the court was not authorized to change the prior sentences that were pronounced so as to make them run consecutively rather than concurrently, for once the concurrent sentences were imposed, the court was without jurisdiction to modify the sentences to make them run consecutively. *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979).

Where defendant was placed on probation after conviction and was subsequently convicted of loitering and his probation revoked, defendant was imprisoned for his original misconduct, not for what might appear to be a simple act of loitering. *Murphy v. State*, 269 Ark. 181, 599 S.W.2d 138 (1980).

Where the trial court revoked the defendant's probation and sentenced him to a term of imprisonment at the Department of Correction, the court could not impose a term of probation on the defendant in addition to the imprisonment. *Marion v. State*, 4 Ark. App. 359, 631 S.W.2d 315 (1982).

Sentence is not imposed until the court pronounces a fixed term of imprisonment as opposed to simply specifying a definite period of time of probation. *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980).

Where court revoked suspension of sentence to run concurrently with sentence in federal court on a separate offense, and then over a year later entered order to the effect that defendant had violated the conditions of the suspended sentence and ordered him committed for five years, the second sentence was void since a second sentence cannot be imposed at a subsequent revocation hearing; moreover, since the first sentence had already been put into execution, the court was without jurisdiction when it pronounced the second sentence, for once a valid sentence is put into execution the trial court is without jurisdiction to modify, amend, or revise it. *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983).

Where defendant was sentenced to period of imprisonment for one year and any

additional term of imprisonment for a period of up to five years was suspended, imposition of nine year sentence upon revocation of suspension when court found defendant, subsequent to his release, committed the crime of robbery was proper since 10 years is the maximum for the crime for which he was placed on suspension. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Where after defendant pleaded guilty to a charge of theft, a class C felony for which the maximum sentence is 10 years, the court could sentence defendant to one year of imprisonment and suspend imposition of an additional sentence to the penitentiary for a period of five years, since the five year period of suspension did not exceed the maximum prison sentence allowable for the offense. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

In accepting defendant's guilty plea, adjudicating him guilty, and placing him on probation for five years, trial court did not impose a sentence on defendant, and, upon revoking probation and sentencing defendant, court was not limited to the length of the probation, but could impose any sentence that it might have originally imposed for the charges to which defendant pleaded guilty. *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989).

Where an order of suspension and a judgment contain conflicting information as to the sentence imposed, the judgment is controlling. *Green v. State*, 29 Ark. App. 69, 777 S.W.2d 225 (1989).

A prosecutor should not be required to file a revocation petition prior to the expiration of the suspension or probationary period in cases involving unpaid restitution because it cannot be known until the period has fully expired whether the defendant has made restitution; a defendant could conceivably pay the full amount owed on the last day of the period and fulfill his or her obligation. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

Since, pursuant to § 5-4-303(f), the trial court retains jurisdiction until the full amount of restitution is paid, even beyond the period originally allowed, the prosecutor was not required to comply with the requirements of subsection (e), because appellant's deferred sentence was not revoked but merely extended to allow her to

pay the restitution. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

The requirements of subsection (d) did not apply to a defendant who was never imprisoned and whose sentence was not revoked. *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

Once the defendant's probation was revoked for commission of a drug-related offense and the defendant was sentenced to a term of imprisonment, he could not later again have his probation revoked and be sentenced to an even longer term of imprisonment. *Ramey v. State*, 62 Ark. App. 204, 972 S.W.2d 952 (1998).

Where no sentence was imposed upon the appellant when he entered his guilty plea and, instead, he was placed on probation, the trial court was authorized under subsection (f) to impose any sentence on the appellant which might have been originally imposed for the offense of which he was found guilty, even though the petition to revoke probation was filed on the last day of his probation. *Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999).

Although the defendant's terms of probation on two separate crimes ran concurrently, when his probation was revoked, the court had authority to impose consecutive sentences. *Webb v. State*, 66 Ark. App. 367, 990 S.W.2d 591 (1999).

Subsection (f) provides a circuit court with ample authority and jurisdiction to enter a judgment of conviction upon a second or subsequent revocation and to impose any sentence that might have been imposed originally for the offense of which the defendant was found guilty. *Bonham v. State*, 73 Ark. App. 320, 43 S.W.3d 753 (2001).

Trial court lost subject matter jurisdiction under subsection (f) of this section to modify defendant's sentence by imposing an additional term of 15-year suspended sentence because, before 1999 Ark. Acts 1569 was enacted, once an original sentence was put into execution, an attempted modification of the original order was erroneous. *Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003).

Although defendant argued that he should have been sentenced to the remainder of his five years' probation instead of ten years' imprisonment, under § 16-93-402(e), the trial court did not modify defendant's sentence but rather revoked it pursuant to this section, which was permissible; defendant was sentenced to five years' probation and fined, thus, there was no sentence imposed and the trial court did not err in sentencing him to ten years' imprisonment as it could have done originally. *Rickenbacker v. Norris*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 198 (Mar. 31, 2005).

Cited: *Matthews v. State*, 265 Ark. 298, 578 S.W.2d 30 (1979); *Ross v. State*, 267 Ark. 1027, 593 S.W.2d 475 (Ct. App. 1980); *Needham v. State*, 270 Ark. App. 131, 640 S.W.2d 118 (Ct. App. 1980); *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985); *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997); *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998); *Shavers v. State*, 66 Ark. App. 173, 991 S.W.2d 622 (1999); *Farrelly v. State*, 70 Ark. App. 158, 15 S.W.3d 699 (2000); *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001); *Byrd v. State*, 84 Ark. App. 203, 138 S.W.3d 109 (2003).

5-4-310. Revocation hearings.

(a)(1) A defendant arrested for violation of suspension or probation is entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he or she has violated a condition of suspension or probation.

(2) The preliminary hearing shall be conducted by a court having original jurisdiction to try a criminal matter as soon as practicable after arrest and reasonably near the place of the alleged violation or arrest.

(3) The defendant shall be given prior notice of the:

- (A) Time and place of the preliminary hearing;
- (B) Purpose of the preliminary hearing; and
- (C) Condition of suspension or probation the defendant is alleged to have violated.

(4) Except as provided in subsection (c) of this section, the defendant has the right to hear and controvert evidence against him or her and to offer evidence in his or her own behalf.

(5)(A) If the preliminary hearing court finds that there is reasonable cause to believe that the defendant has violated a condition of suspension or probation, it shall order the defendant held for further revocation proceedings before the court that originally suspended imposition of sentence on the defendant or placed him or her on probation.

(B)(i) If the preliminary hearing court does not find reasonable cause, it shall order the defendant released from custody.

(ii) However, a release under subdivision (a)(5)(B)(i) of this section does not bar the court that suspended imposition of sentence on the defendant or placed him or her on probation from holding a hearing on the alleged violation of suspension or probation or from ordering that the defendant appear before it.

(6) The preliminary hearing court shall prepare and furnish to the court that suspended imposition of sentence on the defendant or placed him or her on probation a summary of the preliminary hearing, including the responses of the defendant and the substance of the documents and evidence given in support of revocation.

(b)(1) A suspension or probation shall not be revoked except after a revocation hearing.

(2) The revocation hearing shall be conducted by the court that suspended imposition of sentence on the defendant or placed him or her on probation within a reasonable period of time after the defendant's arrest, not to exceed sixty (60) days.

(3) The defendant shall be given prior written notice of the:

(A) Time and place of the revocation hearing;

(B) Purpose of the revocation hearing; and

(C) Condition of suspension or probation the defendant is alleged to have violated.

(4) Except as provided in subsection (c) of this section, the defendant has the right to:

(A) Hear and controvert evidence against him or her;

(B) Offer evidence in his or her own defense; and

(C) Be represented by counsel.

(5) If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation.

(c) At a preliminary hearing pursuant to subsection (a) of this section or a revocation hearing pursuant to subsection (b) of this section:

(1) The defendant has the right to confront and cross-examine an adverse witnesses unless the court specifically finds good cause for not allowing confrontation; and

(2) The court may permit the introduction of any relevant evidence of the alleged violation, including a letter, affidavit, and other documentary evidence, regardless of its admissibility under the rules governing the admission of evidence in a criminal trial.

(d) A preliminary hearing pursuant to subsection (a) of this section is not required if:

- (1) The defendant waives the preliminary hearing;
- (2) The revocation is based on the defendant's commission of an offense for which he or she has been tried and found guilty in an independent criminal proceeding; or
- (3) The revocation hearing pursuant to subsection (b) of this section is held promptly after the arrest and reasonably near the place where the alleged violation occurred or where the defendant was arrested.

History. Acts 1975, No. 280, § 1209; A.S.A. 1947, § 41-1209.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

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Purpose.

The purpose of the 60-day requirement in subsection (b) of this section is to assure that a defendant who has been arrested for violation of probation is not held in jail for an unreasonable time awaiting his revocation hearing. *Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994).

Applicability.

The 60-day limitation of subsection (b) of this section is not applicable to a case where there is nothing in the record that indicates defendant was arrested for violating the terms of his probation. *Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994).

Authority to Modify.

Trial court had the authority to modify a sentence pronounced in open court prior to the entry of judgment because the oral order was not effective until set forth in writing and filed of record; although defendant claimed a denial of the right to be present at all proceedings, he was present for all portions of the proceedings, and although § 16-65-121 had provided that a judgment rendered in open court was effective from that date, the statute has been superceded. *Hankins v. State*, 84 Ark. App. 370, 141 S.W.3d 905 (2004).

Authority to Revoke.

Where, while the defendant was serving probation imposed by the court of one county, he was convicted of an unrelated felony by the court of a second county, the court of the second county was without authority to revoke his probation; instead, the defendant should have been returned to the first county for a revocation hearing. *Gill v. State*, 290 Ark. 1, 716 S.W.2d 746 (1986).

A conviction in violation of probation warrants revocation even though the conviction may have been appealed. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

The court did not have the power to revoke defendant's suspended sentence prior to the commencement of the suspension period. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Burden on State.

In probation revocation proceeding, the burden was on the State to show that defendant had been apprised of the revocation hearing, and the nature thereof, and had been given an opportunity to contact his counsel if he so desired. *Akins v. State*, 4 Ark. App. 235, 628 S.W.2d 880 (1982).

In a hearing to revoke, the burden is upon the state to prove the violation of a condition by a preponderance of the evidence, and on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

In a hearing to revoke, the burden is upon the state to prove a violation of a condition of the suspended sentence by a preponderance of the evidence, and on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Tipton v. State*, 47 Ark. App. 187, 887 S.W.2d 540 (1994).

Confrontation of Witness.

Where the substance of accomplice's written statement concerning robbery was disclosed by other evidence at revocation hearing, particularly the testimony of the probationer himself, the probationer was not prejudiced by the accomplice's failure to testify in person even though the trial court made no specific finding of any cause for not allowing confrontation as is required under subdivision (c)(1). *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

In a probation revocation proceeding the trial court must balance the probationer's right to confront witnesses against grounds asserted by the state for not requiring confrontation. The court should first assess the state's explanation of why confrontation is undesirable or impractical, and second, consider the reliability of the evidence which the state offers in place of live testimony. *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989).

Although the rules of evidence do not apply in revocation proceedings, this is not meant to deny a probationer his due process right to confront witnesses. *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989).

Although the rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings, the right to confront the witnesses is. *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990).

Conversion of Fine into Sentence.

The equal protection rule that the state cannot impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full was not violated where the defendant, with the assistance of counsel, tendered his own schedule of payment for restitution in exchange for a suspended sentence and then made sporadic payments in violation of the payment schedule. *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

Due Process.

Where defendant received suspended sentences on four charges and a petition to revoke suspension of one sentence was dismissed on the basis of the sixty-day limitation of this section, but motion to dismiss was denied respecting petitions on other three sentences and suspension was revoked with respect to one of them, defendant was not denied due process by court's refusal to dismiss such petitions. *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (Ct. App. 1980).

Defendant was held not to be denied the due process right of confrontation of witnesses, since this section only entitles defendant to fundamental fairness, with an opportunity to be heard rather than a comprehensive hearing. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981).

Where the trial court merely concluded that it had previously heard enough evidence at trial for another offense to revoke defendant's probation, the defendant was denied the fundamental fairness of a hearing as is required under this section. *Akins v. State*, 4 Ark. App. 235, 628 S.W.2d 880 (1982).

The trial judge erred in revoking the defendant's suspended imposition of sentence in violation of his constitutional right to due process because defendant was not given notice of the basis for his revocation nor was he afforded a meaningful opportunity to be heard on it. *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

Where defendant's suspended sentences were revoked after a full trial and verdict of guilty on another charge, there was no question that he was afforded his due process rights before the revocation decision was made. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Evidence.

Although the mere presence of marijuana in defendant's apartment would not have been sufficient to convict one charged with possession of a controlled substance, it was sufficient evidence from which the trial court could determine that defendant had violated the terms of his probation. *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ct. App. 1980).

Fact that police officers act in good faith is sufficient at a revocation hearing to permit the introduction of evidence not admissible at a formal trial; the reason is to provide the trial judge with complete information bearing on the admissibility of revoking probation. *Dabney v. State*, 278 Ark. 375, 646 S.W.2d 4 (1983).

Relevant evidence which is not admissible at a criminal trial may be admissible at a revocation hearing. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

Evidence as to defendant's accomplice liability in liquor store robbery was sufficient to justify the revocation of his probation. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

The statement of an accomplice concerning the details of the robbery committed by him and the probationer constituted relevant evidence in revocation hearing. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

The trial court's decision to revoke the defendant's suspended sentence, which had been conditioned on his making restitution, was not clearly against a preponderance of the evidence; the defendant's failure to make the ordered payments, in light of his standard of living, his purchase of a \$17,000 car, and the fact that he did not search for a job outside his field could be construed as an inexcusable failure to comply with the conditions of his suspension. *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

The rules of evidence are not applicable in sentence revocation proceedings. *Tipton v. State*, 47 Ark. App. 187, 887 S.W.2d 540 (1994).

Hearings.

A preliminary revocation hearing is not required to determine if defendant has violated a condition of suspension if defendant is arrested for committing another criminal offense. *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989).

Jurisdiction.

Subject matter jurisdiction is granted to a particular position and not to the individual who fills it; accordingly, the defendant who had his suspended sentences revoked was mistaken in his argument that the language that the revocation "hearing shall be conducted by the court that suspended imposition of sentence on defendant" in subsection (b) meant that only the judge who suspended his sentences could revoke them. *Nation v. State*, 283 Ark. 250, 674 S.W.2d 939 (1984).

Notice.

The allegations of the petition for revocation of a suspended sentence gave adequate notice of the claimed violation of suspension where it alleged that defendant had been charged with burglary and theft and that the facts and circumstances surrounding the charges violated the conditions of the suspended sentence. *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977).

Defendant held not to have received proper notice as required by this section. *Akins v. State*, 4 Ark. App. 235, 628 S.W.2d 880 (1982).

There was no error in failure to give defendant written notice of the time and place of revocation hearing, in light of the fact that defendant did receive actual notice of the time and place of the hearing and did not ask for a continuance. *Reynolds v. State*, 282 Ark. 98, 666 S.W.2d 396 (1984).

Motion to dismiss revocation petition was denied where state was not placed on notice before revocation hearing that 60 day statutory period would be raised. *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987).

The trial judge did not abuse his discretion in denying defendant's request for continuance, and defendant was not prejudiced by the state's failure to provide written notice of the revocation hearing where defendant had actual notice of the hearing. *Green v. State*, 29 Ark. App. 69, 777 S.W.2d 225 (1989).

Trial court did not err by revoking probation on the lesser included offense of sexual abuse in the first degree after the state had notified defendant that rape would be the basis for the revocation. *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992).

Where defendant demonstrated no prejudice resulting from his probation being revoked based on evidence that he delivered a counterfeit controlled substance, after acquittal on a charge of delivery of a controlled substance, defendant was not denied notice or an opportunity to be heard under this section. *Phillips v. State*, 40 Ark. App. 19, 840 S.W.2d 808 (1992).

The State has a right to be notified prior to the hearing that a defendant will raise a speedy-hearing objection, and defendant waived his objection by failing to move for dismissal of the petition prior to the hearing. *Wilkerson v. State*, 53 Ark. App. 52, 920 S.W.2d 15 (1996).

Preliminary Hearing.

Where the defendant was charged with violating conditions of his suspension because he committed the offense of criminal attempt, the probable cause hearing on the criminal attempt charge served the same purpose as a preliminary hearing on the suspension revocation, and the defendant was not prejudiced by the lack of a preliminary hearing pursuant to subsection (a) of this section. *Dunavin v. State*, 18 Ark. App. 178, 712 S.W.2d 326 (1986).

Where the defendant was charged with violating conditions of his suspension because he committed the offense of criminal attempt, the probable cause hearing on the criminal attempt charge served the same purpose as a preliminary hearing on the suspension revocation and, therefore, the defendant was not prejudiced by the lack of a preliminary hearing pursuant to subsection (a). *Bonham v. State*, 73 Ark. App. 320, 43 S.W.3d 753 (2001).

Right to Counsel.

In probation revocation proceedings, the right to counsel may be waived, but the waiver must be made knowingly, voluntarily, and intelligently; and defendant's waiver of his right to counsel when he initially pled guilty did not constitute an intelligent waiver to all further proceedings. *Furr v. State*, 285 Ark. 45, 685 S.W.2d 149 (1985).

The trial court's action in relieving the defendant's counsel at the revocation hearing without affording the defendant an opportunity to retain new counsel constituted reversible error, even though the defendant had not paid his counsel in full, and the defendant had had numerous opportunities to obtain counsel but had failed to do so. *Suire v. State*, 18 Ark. App. 166, 712 S.W.2d 317 (1986).

Defendant's direct appeal of his judgment of conviction preserved his right to object to his lack of counsel during sentencing where he was never informed by the court he had a right to counsel for the sentencing phase, and he was not precluded from objecting to his lack of counsel at sentencing because of his failure to object at the trial level or because he also filed a new-trial motion. *Smith v. State*, 329 Ark. 238, 947 S.W.2d 373 (1997).

Time Limitation.

Requirement that a suspension or revocation hearing be conducted within statutory period after arrest applies only to arrest for a revocation or suspension of a suspended sentence, not an arrest on another charge while defendant was allegedly serving a suspended sentence. *Walker v. State*, 262 Ark. 215, 555 S.W.2d 228 (1977).

Where a defendant was arrested not for violation of the terms of suspension, but for a new offense, the statutory period which runs from the date of arrest on a petition to revoke a suspended sentence, would not apply and a revocation order entered more than statutory period after the arrest was valid. *Blake v. State*, 262 Ark. 301, 556 S.W.2d 427 (1977).

The statutory period contained in this section begins to run from his arrest for a violation of the terms of suspension, not from his arrest upon other charges. *Lincoln v. State*, 262 Ark. 511, 558 S.W.2d 146 (1977); *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

The statutory period specified in subsection (b) was not intended by the legislature to be jurisdictional but merely represents the period beyond which the hearing cannot be delayed if the defendant objects. *Haskins v. State*, 264 Ark. 454, 572 S.W.2d 411 (1978).

It would not be proper to hold that the statutory period of this section applies not only to cases on which the state has filed

to revoke suspension, but to cases on which it has not filed, where there is no inference that failure was the result of an improper motive. *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (Ct. App. 1980).

Since the purpose of the limitation period is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing, the limitation loses its meaning when he is already serving time on another charge. *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980); *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986); *Green v. State*, 29 Ark. App. 69, 777 S.W.2d 225 (1989); *Parks v. State*, 303 Ark. 208, 795 S.W.2d 49 (1990).

Statutory period for a revocation hearing did not begin to run on date warrant of arrest was issued on revocation petition where defendant was already incarcerated on other charge. *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

The statutory period of subsection (b) begins to run from the date of a defendant's arrest for the alleged violation of the terms of his suspended sentence. *Lark v. State*, 276 Ark. 441, 637 S.W.2d 529 (1982).

Where the state was put on notice by defendant's motion for habeas corpus that he was seeking a speedy hearing on revocation petition and he never backed away from this position at any time, the state should have conducted the hearing no later than the statutory period after arrest and where a greater period of time had elapsed before hearing, petition for revocation must be dismissed. *McKee v. State*, 7 Ark. App. 273, 647 S.W.2d 490 (1983).

This section relates to an arrest for violation of the conditions of a suspended sentence and not an arrest on another charge; accordingly, where defendant, who was arrested on another charge, was brought to a hearing within the statutory period from the time he was notified that the petition for revocation had been filed, the requirements of this section were met. *Reynolds v. State*, 282 Ark. 98, 666 S.W.2d 396 (1984).

The appellate courts look to the provisions of ARCrP, Rule 28.3 for guidance in computing excludable periods of time from the statutory period required for revocation hearings under subsection (b) of this

section. *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985).

A period of days after defendant was arrested in another state as a fugitive and before he was returned to Arkansas was excludable from the statutory period required for revocation hearings under subsection (b). *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985).

A clearly established distinction has been made between arrest for violation of the conditions of a suspended sentence and arrest for other charges in determining whether a revocation hearing under subsection (b) has been held within statutory period after arrest. *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

The statutory period for a revocation hearing provided by subsection (b) of this section must also be applied to § 5-4-309(e) in determining whether a defendant has been arrested for violation of the conditions of a suspended or probated sentence before the expiration of the period of the suspension or probation. *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985).

Defendant suffered no prejudice by the revocation hearing not being held within the statutory period, because after his arrest he had already been incarcerated on an unrelated charge. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

This section does not require that judgment must be given within 60 days of arrest. *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

The purpose of the requirement that the hearing must be held within 60 days of the arrest is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing. *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

Time limitation for holding hearing relates to the time for having a hearing after the defendant is notified that the revocation petition has been filed, and that is all that is required. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

When there has been no arrest, the requirement of holding the hearing within 60 days is not absolute. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

Compliance with § 5-4-309 and this section was sufficient where the defendant was not surprised by the timing of the hearing nor was he prejudiced in any

way by not having been arrested or summoned. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 925 (1988).

The specific wording of subdivision (b)(2) states that the hearing must be held within 60 days "after" the defendant's arrest. Therefore, for purposes of computation, counting would begin on the day following defendant's arrest. *Petty v. State*, 31 Ark. App. 119, 788 S.W.2d 744 (1990).

The purpose of subdivision (b)(2) is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing. *Holmes v. State*, 33 Ark. App. 168, 803 S.W.2d 563 (1991).

Defendant, until he waived extradition, was "unavailable" for trial for the purpose of computing the 60 days. *Rodgers v. State*, 49 Ark. App. 136, 898 S.W.2d 475 (1995).

When a defendant chooses to have the revocation matter be deferred until disposition of an underlying charge, he cannot then turn around and complain of delay pursuant to subsection (b)(2). *White v. State*, 329 Ark. 487, 951 S.W.2d 556 (1997).

The constitutional right to a speedy trial does not apply to probation revocation hearings. *White v. State*, 330 Ark. 720, 957 S.W.2d 683 (1997).

Hearing on a petition for revocation was held within the 60-day time limit under subdivision (b)(2) of this section and, thus, the trial court did not err in denying defendant's motion to dismiss. *Lindsey v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 396 (May 26, 2004).

Written Statement.

Although the order entered by the trial court in revoking defendant's suspended sentence did not give a statement of the evidence relied on and the reasons for the revocation, when the "Bill of Exceptions"

showed the trial court relied on a subsequent conviction, there was substantial compliance with this section. *Rutledge v. State*, 263 Ark. 300, 564 S.W.2d 511 (1978).

Where defendant failed to request a written statement of the court's basis for revoking probation, as provided for in subsection (b), failure to object to the omission precluded consideration of the point on appeal. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981).

One purpose of the written statement is to permit the defendant to know the precise basis of the trial court's decision so that he may conduct an intelligent appeal. *Phillips v. State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988).

Where the defense has failed to show the prejudicial effect of not receiving a written statement, the trial court must be affirmed. *Phillips v. State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988).

Written findings are required under subsection (b)(5) only when suspension or revocation is revoked. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993).

Defendant waived the right to receive a written statement of the evidence used by a trial court to revoke defendant's probation by failing to raise the issue in the trial court. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003).

Cited: *Schneider v. State*, 269 Ark. 245, 599 S.W.2d 730 (1980); *Dabney v. State*, 278 Ark. 375, 646 S.W.2d 4 (1983); *Chancellor v. State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985); *State v. Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988); *Brooks v. State*, 36 Ark. App. 40, 819 S.W.2d 288 (1991); *Bilderback v. State*, 319 Ark. 643, 893 S.W.2d 780 (1995); *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997); *Cook v. State*, 59 Ark. App. 25, 952 S.W.2d 677 (1997).

5-4-311. Discharge and dismissal.

(a) If a judgment of conviction was not entered by the court at the time of suspension or probation and the defendant fully complies with the conditions of suspension or probation for the period of suspension or probation, the court shall discharge the defendant and dismiss any proceedings against him or her.

(b)(1) Subject to the provisions of §§ 5-4-501 — 5-4-504, a person against whom proceedings are discharged or dismissed under subsec-

tion (a) of this section may seek to have the criminal record sealed, consistent with the procedures established in § 16-90-901 et seq.

(2) This subsection does not apply if:

(A) The person applying for discharge has been convicted of a sexual offense as defined by § 5-14-101 et seq.; and

(B) The victim was under eighteen (18) years of age.

History. Acts 1975, No. 280, § 1210; 1210; Acts 1995, No. 998, § 1; 1999, No. 1977, No. 474, § 10; A.S.A. 1947, § 41- 1407, § 2.

CASE NOTES

In General.

Where defendant received only probation, i.e., no fine or prison term, no conviction judgment should have been entered, thus entitling her later to be discharged and have all proceedings dismissed against her if she complied with the conditions of her probation; however, where defendant failed to object to the entry of

her judgment of conviction, she lost that relief to which she was entitled under this section. *Baker v. State*, 318 Ark. 223, 884 S.W.2d 603 (1994).

Cited: *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986); *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998).

5-4-312 — 5-4-319. [Reserved.]

5-4-320. Certain convicted felons to observe operations of correctional facility.

(a) Any person who pleads guilty or nolo contendere or is found guilty in any circuit court of this state of a felony and whose sentence of imprisonment is placed on suspension or who is placed on probation may be ordered by the circuit court to report to an appropriate Department of Correction facility on a date certain to be scheduled by the department for the duration of that work day to observe the operation of the department's facility.

(b) The person convicted of the felony shall bear the cost of transportation to and from the department's facility.

History. Acts 1985, No. 548, § 1; A.S.A. 1947, § 41-1212.

5-4-321. Judgment in certain misdemeanor traffic cases — Postponement.

(a) In a misdemeanor traffic case, other than a case involving driving under the influence of alcohol or a drug, a judge may postpone a judgment for not more than one (1) year, and during the one (1) year period a defendant:

(1) Is in a probation status, supervised or unsupervised; and

(2) Remains in a probation status until a judgment is entered.

(b) At the request of a defendant, parent of a minor defendant, or counsel for a defendant, judgment shall be entered as quickly as feasible and not more than ten (10) days following the request.

(c) At the request of a defendant, parent of a minor defendant, or counsel for a defendant, probation may be continued and judgment postponed for more than one (1) year.

History. Acts 1985, No. 967, §§ 1, 2; A.S.A. 1947, §§ 75-1059, 75-1060; Acts 1987, No. 457, § 1.

Publisher's Notes. Acts 1985, No. 967, §§ 1, 2, are also codified as §§ 27-50-701, 27-50-702.

5-4-322. District court or city court — Probation — Fees and fines authorized.

(a)(1) A district court or city court may:

(A) Place a defendant on probation or sentence him or her to public service work; and

(B) As a condition of its order, require the defendant to pay a:

(i) Fine in one (1) or several sums; and

(ii) Probation fee or a public service work supervisory fee in an amount to be established by the district court or city court.

(2)(A) The broad objective of probation is to educate and rehabilitate a person placed on probation.

(B) A condition for probation shall bear a reasonable relationship to the offense committed or to future criminality and be reasonably necessary to assist the defendant in leading a law-abiding life.

(3)(A) A condition of probation shall be closely monitored and supervised by the district court or city court or by a probation officer.

(B) The district court or city court shall determine if a condition of probation is in compliance with the provisions of subdivision (a)(2) of this section.

(b)(1) This section regarding probation and probation fees does not apply when the defendant is charged with violating the Omnibus DWI Act, § 5-65-101 et seq., or the Underage DUI Law, § 5-65-301 et seq.

(2) When the defendant is charged with violating the Omnibus DWI Act, § 5-65-101 et seq., the district court or city court may require the defendant to pay a public service work supervisory fee in an amount to be established by it if the district court or city court orders public service in lieu of jail pursuant to § 5-65-111.

(3) When the defendant is charged with violating the Underage DUI Law, § 5-65-301 et seq., the district court or city court may require the defendant to pay a public service work supervisory fee in an amount to be established by it for any public service work ordered by the district court or city court.

(c) This section is supplemental to any other law allowing a district court or city court to attach a condition on an order of probation.

(d)(1) Except as provided in subsection (e) of this section, no district court or city court may impose a probation fee in any case in which the only sentence available is a monetary fine, court costs, or if applicable, restitution.

(2) In a case described in subdivision (d)(1) of this section, a defendant may be given time to make the payments, and the installment

payment fee in § 16-13-704 is the only fee authorized for administering those accounts.

(3) If the sentence available includes imprisonment, probation and probation fees may be ordered in lieu of imprisonment.

(e) If a fine is an authorized sentence, the fine may be suspended and probation and a probation fee may be ordered in lieu of the fine.

(f)(1) A probation fee shall be collected in full for each month in which a defendant is on probation.

(2) The probation fee shall accrue for each month that a defendant does not make a payment and the defendant remains on probation as ordered by the district court or city court.

History. Acts 1991, No. 190, § 1; 1993, No. 777, § 1; 2001, No. 1809, § 4; 2003, No. 1765, § 2; 2005, No. 2239, § 1.

Amendments. The 2001 amendment rewrote (a); redesignated former (b) as present (b)(1) and inserted “regarding probation and probation fees”; added (b)(2); and inserted “district court, city court, or police court” in (c).

The 2003 amendment deleted “municipal

court” preceding “district court” in (a) and (c); and added (d) and (e).

The 2005 amendment redesignated former (a) as present (a)(1); deleted “police court” following “city court” in (a)(1) and in (c) and made related changes; added (a)(2) and (a)(3); added “or the Underage DUI Law, § 5-65-301 et seq.” in (b)(1); and added (b)(3) and (f).

5-4-323. Additional conditions — High school diploma or general education development certificate — Employment training.

(a)(1) As an additional requirement for suspension of sentence or probation, a court may require any person who is sentenced for a felony or a Class A misdemeanor to make a good faith effort toward completion of a high school diploma or a general education development certificate unless the person has already achieved a high school diploma or a general education development certificate.

(2) The additional requirement under subdivision (a)(1) of this section shall be implemented only:

(A) After the appropriate school or adult education program has received notice from the court at least ten (10) working days prior to the person’s making application to enroll so as to allow a school or adult education program official to review the person’s educational records; and

(B) Upon the acceptance of the person by the administrative head of the school or adult education program.

(3) If no appropriate school or adult education program can be found, the additional requirement under subdivision (a)(1) of this section is of no effect.

(4) In the alternative, the court may allow the defendant to pursue a prescribed course of study or vocational training approved by the court that is designed to equip him or her for suitable employment.

(5)(A) After consultation with the school or the adult education program, the court shall determine the appropriate documentation for a person participating under a provision of this section and shall

report any documentation of school or adult education program participation on a quarterly basis to the Administrative Office of the Courts.

(B) The office shall then report to the Department of Workforce Education.

(b)(1) Unless the person is employed or has a skill that will facilitate immediate employment, the court may require any person sentenced for a felony or a Class A misdemeanor to make a good faith effort toward obtaining gainful employment by participating in an appropriate employment training program as an additional requirement for suspension of sentence or probation.

(2)(A) The additional requirement under subdivision (b)(1) of this section shall be implemented by the person's reporting to the local workforce center for registration, intake, and employability skills assessment.

(B) If the person is on probation, the additional requirement under subdivision (b)(1) of this section shall be accomplished in conjunction with the probation officer.

(C) In addition to the employability skills assessment, the person shall register for employment with the local workforce center and upon obtaining employment shall communicate the event to the:

- (i) Court if on suspension of sentence; or
- (ii) Probation officer if on probation.

(c)(1) A court shall not revoke a suspension of sentence or probation because of a person's inability to achieve a high school diploma, general education development certificate, or gainful employment.

(2) However, the court shall revoke a suspension of sentence or probation if the person fails to make a good faith effort to achieve a high school diploma, general education development certificate, or gainful employment.

(d) "A good faith effort" means a person:

(1) Has been enrolled in a program of instruction leading to a high school diploma or a general education development certificate and is attending a school or an adult education course; or

(2) Is registered for employment and enrolled and participating in an employment training program with the purpose of obtaining gainful employment.

(e) Any person who fails to make a good faith effort to comply with a court order issued pursuant to this section is guilty of an unclassified misdemeanor and shall be punished by a fine of at least one hundred dollars (\$100) but not more than one thousand dollars (\$1,000).

History. Acts 1991, No. 857, § 1; 1993, No. 343, § 1; 1993, No. 1267, § 1; 1994 (2nd Ex. Sess.), No. 30, § 4; 1994 (2nd Ex. Sess.), No. 31, § 4; 1999, No. 1323, § 2; 2003, No. 1006, § 1.

A.C.R.C. Notes. Identical Acts 1994 (2nd Ex. Sess.), Nos. 30 and 31, § 5,

provided: "The Department of Vocational Education shall promulgate emergency rules and regulations to implement the provisions of this act relative to adult education within ten (10) days from and after its passage and approval."

Amendments. The 2003 amendment

substituted “court may require any person who is sentenced for a felony” for “court shall require any person who is convicted of a felony” in present (a)(1); added

present (a)(4) and (c); rewrote (b) and present (d); and redesignated former (d) as present (e).

CASE NOTES

Good Faith Effort.

Whether a good faith effort has been made is a question of fact to be determined by the trial judge. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998).

The fact that the defendant had been truant once, tardy twice and suspended

for ten days from school, all within a period of less than a month, was sufficient proof of his lack of a good faith effort to obtain his high-school diploma or GED in violation of his probation. *Ramsey v. State*, 60 Ark. App. 206, 959 S.W.2d 765 (1998).

SUBCHAPTER 4 — IMPRISONMENT

SECTION.

- 5-4-401. Sentence.
- 5-4-402. Place of imprisonment.
- 5-4-403. Multiple sentences — Concur-

SECTION.

- rent and consecutive terms.
- 5-4-404. Credit for time spent in custody.

Publisher’s Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1983, No. 409, § 6: July 1, 1983. Emergency clause provided: “It is hereby determined by the General Assembly that certain criminal sentencing statutes are in need of immediate clarification for the more efficient administration of justice in this State. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1983.”

Acts 1985, No. 982, § 3: Apr. 15, 1985.

Emergency clause provided: “It is hereby found and determined by the General Assembly that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in enforcement of the provisions of Acts 306 and 417 of 1983. This Act is immediately necessary to provide such enforcement assistance for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

ALR. Work-release or “hardship” sentences: Computation of incarceration time under. 28 ALR 4th 1265.

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 972 et seq.

C.J.S. 24 C.J.S., Crim. L., § 1582 et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Legislative Survey, Criminal Law, 8 UALR L.J. 559.

Legislative Survey, Juvenile Law, 8 UALR L.J. 591.

5-4-401. Sentence.

(a) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:

(1) For a Class Y felony, the sentence shall be not less than ten (10) years and not more than forty (40) years, or life;

(2) For a Class A felony, the sentence shall be not less than six (6) years nor more than thirty (30) years;

(3) For a Class B felony, the sentence shall be not less than five (5) years nor more than twenty (20) years;

(4) For a Class C felony, the sentence shall be not less than three (3) years nor more than ten (10) years;

(5) For a Class D felony, the sentence shall not exceed six (6) years; and

(6) For an unclassified felony, the sentence shall be in accordance with a limitation of the statute defining the felony.

(b) A defendant convicted of a misdemeanor may be sentenced according to the following limitations:

(1) For a Class A misdemeanor, the sentence shall not exceed one (1) year;

(2) For a Class B misdemeanor, the sentence shall not exceed ninety (90) days;

(3) For a Class C misdemeanor, the sentence shall not exceed thirty (30) days; and

(4) For an unclassified misdemeanor, the sentence shall be in accordance with a limitation of the statute defining the misdemeanor.

History. Acts 1975, No. 280, § 901; 1977, No. 474, § 3; 1981, No. 620, § 8; 1983, No. 409, § 2; A.S.A. 1947, § 41-901.

RESEARCH REFERENCES

ALR. Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency. 113 ALR 5th 597.

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Survey — Criminal Law, 10 UALR L.J. 559.

Survey — Criminal Procedure, 10 UALR L.J. 567.

Survey — Probate, 10 UALR L.J. 599.

Notes, Criminal Law — Child Abuse Resulting in Death — Arkansas Amends its First Degree Murder Statute, 10 UALR L.J. 785.

Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 885.

CASE NOTES

ANALYSIS

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In General.

Sentencing in Arkansas is entirely a matter of statute. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Construction.

When a defendant is facing his third violent felony conviction, his "third strike," a defendant will receive a harsher sentence under § 5-4-501(d) than he would have otherwise received under this section. *Nahlen v. State*, 330 Ark. 1, 953 S.W.2d 877 (1997).

Because Class D felonies are the only classified felonies that do not have a specified lower limit for sentencing, 'zero' was held to be the lower limit of the sentencing range for a Class D felony. *Slaughter v. State*, 69 Ark. App. 65, 12 S.W.3d 240 (2000).

Applicable Law.

The reclassification of an offense from one class of felony to another was a substantive change in the law and that those charged with the offense after the effective date of the amendment should be tried under the substantive law in effect when the crime was committed. *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982); *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985).

Revocation of defendant's probation and sentence of eight years imprisonment was proper where the State met its burden of proof for a conviction of a felon in possession of a firearm, a Class B felony; because defendant's conviction on the Class B level was not illegal on its face, the trial court did not impose an illegal sentence upon him when resentencing him after his pro-

bation revocation, notwithstanding any possible confusion of the trial court's intent concerning which felony level. *Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003).

Attempted Capital Murder.

Since statutory law regarding conviction for attempted capital murder only allowed for a 30-year sentence, defendant's sentence on that charge had to be modified so that a 30-year sentence, and not the 40-year original sentence, could be imposed. *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002).

Due Process.

Where defendant was sentenced under the 1983 amended version of the Arkansas habitual offender statute not in force when he committed his crime, and which on its face did not apply to him, there was a violation of the ex post facto clause of the Constitution, denying him due process. *Jones v. Arkansas*, 929 F.2d 375 (8th Cir. 1991).

Factors Considered.

Since this section allows the punishment to range from minimum term to a maximum term of years, vesting great discretionary latitude in the jury, the legislature intended for the jury to consider all the aggravating and mitigating circumstances shown by the evidence, else there would be no basis for the exercise of discretion. *Hunter v. State*, 264 Ark. 195, 570 S.W.2d 267 (1978).

The nature of the prior felony and the facts surrounding the incident leading to defendant's arrest do reflect on the seriousness of the crime and are relevant in the determination of sentence, and if these factors were not meant to be considered in sentencing, the General Assembly could have provided for imprisonment for a definite term upon conviction of a felon for possession of a firearm rather than allowing the jury to impose any sentence not in excess of five years. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

Habitual Offenders.

The use of the word "may" in this section and § 5-4-501 does not mean that, in all habitual offender cases, the provisions of both sections are available and that the

court is required to choose from those two statutes; the sentences for habitual offenders are governed by § 5-4-501, and the minimum sentences for habitual offenders are different than for persons who have not been convicted of two or more felonies. *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983).

Modification of Sentence.

While the Supreme Court may reduce a sentence which results from passion or prejudice or is an abuse of the jury's discretion, it is not empowered to reduce a sentence which is within the statutory limits in the absence of error in the proceeding, simply because it might think the sentence to be excessive since to do so would not only be an act of clemency but would be a substitution of the judgment of a group of appellate judges who had not seen or heard the parties and witnesses for the judgment of a jury and a trial judge who had done so. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Where the trial court's errors could have improperly influenced the jury in its setting of the sentence, the Court of Appeals affirmed the conviction but reduced the sentence to the minimum the jury could have given for the offense of which the defendant was convicted. *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980).

Where the sentence was within the lawful maximum for the offense and was unaffected by any demonstrated error in the trial, the Supreme Court had no authority to modify the sentence. *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982).

Where the defendant was originally sentenced to 50 years with 15 years suspended for a Class Y felony, the trial judge was right to modify the sentence to 35 years, but the defendant was not entitled to the 15 years suspended under the original sentence. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

Defendant's conviction for simultaneous possession of drugs and a firearm constituted a Class Y felony for which no part of her sentence could be suspended pursuant to Ark. Code Ann. § 5-4-301(a)(1)(C); therefore, the trial court erred when it suspended 7 years of defendant's 10-year sentence. *State v. Hardiman*, 353 Ark. 125, 114 S.W.3d 164 (2003).

Multiple Penalty Statutes.

If the general assembly specifically au-

thorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct, the trial court may impose cumulative punishment in a single trial. *Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992).

When two punishment statutes exist, a court is not prevented from using the more stringent provision. *Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992).

Optional or Mandatory Sentences.

Inasmuch as the assessment of penalties is optional with the jury, it was reversible error for the trial court to submit a verdict form which indicated that the assessment of penalties was mandatory in case of a verdict of guilty. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978).

Where statute's sentencing provisions are mandatory and imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

Propriety of Sentence.

Evidence sufficient to find that it could not be said that the punishment resulted from passion or prejudice or that the jury abused its discretion, and such sentence was not so wholly disproportionate to the crime as to shock the moral sense of the community. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Where sentence was within the permissible maximum, it was therefore not excessive. *Hunter v. State*, 264 Ark. 195, 570 S.W.2d 267 (1978).

Supreme Court upheld the sentence as within the limits fixed by this section even though the court might have thought it to be unduly severe. *Jennings v. State*, 268 Ark. 216, 594 S.W.2d 855 (1980).

Where defendant who, on another charge, had previously had execution of his sentence suspended and had been placed on probation was again charged and convicted of an offense, the trial court did not err in sentencing him on the revocation of probation or suspended sentence to more time than the term of his probation. *Jefferson v. State*, 270 Ark. 909, 606 S.W.2d 592 (1980).

Sentence did not constitute cruel and unusual punishment, since the sentence was within the limits imposed by statute;

the fact that punishment is severe does not make it cruel or unusual. *Conti v. State*, 10 Ark. App. 352, 664 S.W.2d 502 (1984).

Sentencing of defendant to five years imprisonment for each of five counts of sexual abuse in the first degree was within the statutory range and the Supreme Court would not review defendant's contention that the sentences given for the separate counts were excessive. *Cupit v. State*, 324 Ark. 438, 920 S.W.2d 852 (1996).

Sentencing range of 10 years to 40 years or life was the appropriate range for aggravated robbery by a person who was not a habitual offender notwithstanding that the defendant asserted he was erroneously identified by the trial court as a habitual offender. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Suspension or Probation.

The proper sentence for rape, a Class Y felony under § 5-14-102(a)(1)(2), was 10 to 40 years imprisonment, or life under § 5-4-401(a)(1); probation was not a sentence option. *State v. Pinell*, 353 Ark. 129, 114 S.W.3d 175 (2003).

Unauthorized Sentence.

Where after the defendant entered a guilty plea to class C felony theft of property, for which the maximum sentence is 10 years, a sentence of 6 years in prison, with 2 years suspended on condition that the defendant pay the sum of \$135,000 at the rate of \$200 per month, beginning 60 days after defendant's release from prison, and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not authorized. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

Defendant's sentence of 20 years imprisonment, suspended to an additional term of 20 years, pursuant to his guilty plea to one count of manufacturing methamphetamine, and two counts of possession of drug paraphernalia, was modified to provide that defendant was no longer required to report to a supervising officer, as the sentence was actually one of probation rather than suspension, which was a sentence specifically prohibited by statute. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Where the jury sentenced defendant on

fifteen of the twenty counts of violation of a minor to no term of imprisonment and a fine of zero dollars, the sentence was illegal as the sentencing range was five to twenty years imprisonment, or a fine not to exceed \$15,000, or both; thus, remand for resentencing on those counts was ordered. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

Trial court was not authorized to impose a ten year sentence for a first-degree terroristic threatening conviction, a class D felony punishable by a maximum sentence of six years imprisonment, and defendant thus received an illegal sentence; further, the 10-year sentence recited in the judgment and commitment order was erroneous because the trial court pronounced sentence of only one year at the conclusion of the revocation hearing, and the oral pronouncement of the trial court governed. *Turner v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 654 (Sept. 29, 2004).

Cited: *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977); *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978); *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979); *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979); *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979); *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979); *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ct. App. 1979); *Rogers v. Britton*, 476 F. Supp. 1036 (E.D. Ark. 1979); *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980); *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980); *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980); *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980); *Caldwell v. State*, 268 Ark. 713, 595 S.W.2d 253 (Ct. App. 1980); *Branham v. State*, 274 Ark. 109, 623 S.W.2d 1 (1981); *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981); *Summerlin v. State*, 7 Ark. App. 10, 643 S.W.2d 582 (1982); *Wright v. Burton*, 279 Ark. 1, 648 S.W.2d 794 (1983); *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Stocker v. State*, 280 Ark. 450, 658 S.W.2d 879 (1983); *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *O'Riordan v. State*, 281 Ark. 424, 665 S.W.2d 255 (1984); *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984); *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985); *Scott v. State*, 284 Ark. 388, 681 S.W.2d

915 (1985); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985); *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986); *Leggins v. Lockhart*, 649 F. Supp. 894 (E.D. Ark. 1986); *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987); *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987); *Williams v. State*, 292 Ark. 616, 732 S.W.2d 135 (1987); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988); *Johnson v. State*, 26 Ark. App. 286, 764 S.W.2d 621 (1989); *Scott v. State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989); *Jones v. State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989); *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989); *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990); *Sherman v. State*, 30 Ark. App. 217, 785 S.W.2d 49; *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Mullins v. State*, 303 Ark. 695, 799 S.W.2d 550 (1990); *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990); *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991); *Pennington v. State*, 305 Ark. 507, 808 S.W.2d 780 (1991); *McKillion v. State*, 306 Ark. 511, 815 S.W.2d 936 (1991); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992); *Bonds v. State*, 310 Ark. 541, 837 S.W.2d 881 (1992); *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993); *McKee v. State*, 316 Ark. 174, 871 S.W.2d 351 (1994); *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994); *Woods v. State*, 323 Ark. 605, 916 S.W.2d 728 (1996); *Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996); *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996); *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997); *Allstate Ins. Co. v. Burroughs*, 120 F.3d 834 (8th Cir. 1997); *Kirkendoll v. State*, 57 Ark. App. 321, 945 S.W.2d 400 (1997); *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

5-4-402. Place of imprisonment.

(a) Except as provided in §§ 5-4-203, 5-4-304, and 16-93-708, a defendant convicted of a felony and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(b) Except as provided in § 16-93-708, a defendant convicted of a misdemeanor and sentenced to imprisonment shall be committed to the county jail or other authorized institution designated by the court for the term of his or her sentence or until released in accordance with law.

(c) Except as provided in § 16-93-708, a defendant convicted of a violation of § 5-64-401 shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law.

(d)(1)(A) A juvenile sentenced in circuit court who is less than sixteen (16) years of age when sentenced shall be committed to the custody of the Division of Youth Services of the Department of Health and Human Services until his or her sixteenth birthday, at which time he or she shall be transferred to the Department of Correction, except as provided by court order or parole decision made by the Parole Board.

(B) Any record from the division shall be transferred to the Department of Correction at the time the juvenile is transferred.

(2) A juvenile less than sixteen (16) years of age who is awaiting transfer to the Department of Correction shall be segregated from the general delinquency population housed at the division.

(e)(1) With the consent and approval of the division, the Department of Correction may transfer from the Department of Correction to the division any inmate less than eighteen (18) years of age who, in the opinion of the Department of Correction and the division, is more suited and adaptable by age, physical size, and temperament to a program of the Department of Health and Human Services.

(2)(A) An inmate transferred to the division shall be segregated from the general delinquency population housed at the division.

(B) If an inmate violates a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return the inmate to the Department of Correction.

(3) Any inmate transferred to the division under this subsection shall be returned to the Department of Correction on the inmate's eighteenth birthday.

History. Acts 1975, No. 280, § 902; 1985, No. 982, § 1; A.S.A. 1947, § 41-902; Acts 1999, No. 1192, § 11; 2001, No. 559, § 9; 2005, No. 680, § 2.

The 2005 amendment, in (a), inserted "and 16-93-708" and made a related change; and inserted "Except as provided in § 16-93-708" in (b) and (c).

Amendments. The 2001 amendment added (e).

CASE NOTES

Cited: Cannon v. State, 265 Ark. 270, 578 S.W.2d 20 (1979); Oliver v. State, 14 Ark. App. 240, 687 S.W.2d 850 (1985);

Sossamon v. State, 31 Ark. App. 131, 789 S.W.2d 738 (1990).

5-4-403. Multiple sentences — Concurrent and consecutive terms.

(a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.

(b) When a sentence of imprisonment is imposed on a defendant who has previously been sentenced to imprisonment, whether by a court of this state, a court of another state, or a federal court, the subsequent sentence shall run concurrently with any undischarged portion of the previous sentence unless, upon recommendation of the jury or the court's own motion, the court imposing the subsequent sentence orders it to run consecutively with the previous sentence.

(c) The power of the court to order that sentences run consecutively is subject to the following limitations:

(1) A sentence of imprisonment for a misdemeanor and a sentence of imprisonment for a felony shall run concurrently, and both sentences are satisfied by service of sentence for a felony; and

(2) The aggregate of consecutive terms for misdemeanors shall not exceed one (1) year.

(d) The court is not bound by a recommendation of the jury concerning a sentencing option under this section.

History. Acts 1975, No. 280, § 903; A.S.A. 1947, § 41-903; Acts 2001, No. 1644, § 1.

Amendments. The 2001 amendment inserted “upon recommendation of the

jury or court’s own motion” in (a) and (b); and added (d).

Cross References. Conduct constituting more than one offense, § 5-1-110.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Construction.
Appellate review.
Concurrent sentences.
Consecutive sentences.
Determination of sentence.
Discretion of court.
Evidence.
Filing fees.
Misdemeanors.

Construction.

Subdivision (c)(1) of this section pertains to the power of the court to order consecutive as opposed to concurrent sentences; it is silent on the question of a felony sentence being completed prior to a concurrent misdemeanor sentence. *Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994).

This section says absolutely nothing about the subsequent sentence being discharged by the completion of the earlier sentence when the subsequent sentence extends beyond the earlier sentence; this section takes as a given the probability that a misdemeanor sentence will be shorter in duration than a felony sentence and thus contemplates that the former’s terminal date will fall within the latter’s actual span. *Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994).

Where defendant’s suspended sentence had already been revoked when he was sentenced on the misdemeanor theft-by-receiving charge, there was nothing inconsistent with the intent of this section in the trial court’s decision to order the defendant to be remanded to the custody of

the local authorities to serve the rest of his misdemeanor sentence upon the completion of his felony term. *Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994).

Appellate Review.

Defendant did not preserve the issue of consecutive sentences for appellate review where defendant failed to make an objection after the trial court announced its ruling on his sentences. *Mixon v. State*, 330 Ark. 171, 954 S.W.2d 214 (1997).

Where (1) petitioner pleaded guilty to delivery of a controlled substance, and possession of a controlled substance in separate cases on the same date in 1991, (2) resentencing on the “suspended” sentence for “delivery of a controlled substance” was required because that sentence was illegal, and (3) the commitment orders did not reveal whether the trial court intended the sentences to be served consecutively or concurrently, petitioner was entitled to a reduction, as to the delivery offense, for time served on the possession conviction. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

Trial court had discretion to require defendant’s sentences for two felony convictions to run consecutively with defendant’s remaining sentence for a parole violation, and the sentence was not illegal; in addition, to the extent that defendant contended that the trial court abused its discretion, the matter was not properly preserved because defendant did not object to the trial court. *Campea v. State* Circuit Judge, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 546 (June 30, 2004).

Concurrent Sentences.

In the absence of an order to the contrary, subsequent sentences are to be served concurrently; therefore, where a judgment and commitment were silent as to whether the sentences were to be consecutive or concurrent to sentences that the defendant was already serving time for, the trial court had no authority to amend its judgment and commitment, after the sentences were put into execution, to order that the sentences be served consecutively. *Glick v. State*, 283 Ark. 412, 677 S.W.2d 844 (1984); *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995).

Where the defendant was convicted of a felony and a misdemeanor and ordered to serve consecutive sentences, the misdemeanor sentence was void because the court lacked the authority to impose it under subdivision (c)(1) of this section; therefore, the defendant was entitled to a writ of habeas corpus after he had served the sentence on the felony conviction. *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986).

Consecutive Sentences.

Where defendant had three prior felony convictions and was convicted of four separate counts, a sentence of four consecutive life sentences was neither an abuse of discretion nor cruel and unusual punishment. *Duncan v. State*, 267 Ark. 41, 588 S.W.2d 432 (1979).

Consecutive sentences held proper. *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989).

Sentence of two fifty-year terms, which the court ordered to run consecutively, upheld. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995).

Under this section, the trial court clearly has authority to order that sentences be served consecutively. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Where the circuit judge sentenced the defendant to consecutive rather than concurrent sentences, and the defendant did not have an opportunity to object because the proceedings adjourned prior to the court's pronouncement, the case was remanded for resentencing. *Lawhon v. State*, 327 Ark. 674, 940 S.W.2d 475 (1997), appeal dismissed, 328 Ark. 335, 942 S.W.2d 864 (1997).

Where defendant was prosecuted for

violation of a minor in the first degree and not under the rape statute, the commission of both offenses prohibited sexual intercourse or deviate sexual activity; thus, under subsection (a) of this section, the trial court did not err in imposing consecutive sentences. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

Determination of Sentence.

The choice between concurrent and consecutive sentences is vested in the judge, not the jury; where the trial court attempted to implement what he perceived the jury wanted rather than to exercise his own discretion relative to the sentencing, the Supreme Court remanded for resentencing. *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985).

The question of whether two separate sentences should run consecutively or concurrently lies solely within the province of the trial court. *Abdullah v. State*, 290 Ark. 537, 720 S.W.2d 902 (1986); *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Trial court which had the discretion at the initial sentencing of imposing sentences concurrently or consecutively made them concurrent and, having done so, had no power to change them to consecutive sentences after execution had begun. Trial court cannot modify a valid sentence once execution has begun. *Avants v. State*, 293 Ark. 24, 732 S.W.2d 149 (1987).

Considering that the sentences imposed after defendant's trial for possession of cocaine, methamphetamine, and marijuana were within the statutory maximum and minimum and the trial judge contemplated whether to "stack" them or not, it was abundantly clear that the trial judge exercised discretion when sentencing, and the appellate court could not say that the trial court abused it in that exercise. *Davidson v. State*, 76 Ark. App. 464, 68 S.W.3d 331 (2002), cert. denied, 537 U.S. 820, 123 S. Ct. 98, 154 L. Ed. 2d 28 (2002).

Discretion of Court.

The trial judge did not improperly fail to exercise his discretion in sentencing the defendant and did not err in sentencing him to serve consecutive sentences where the jury recommended that the court sentence the defendant to serve consecutive sentences and the judge deferred to the jury's recommendation. *Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000).

Trial court did not err in sustaining the State's objection to defendant's closing argument regarding the matter of consecutive sentences; the trial court had the discretion only to impose either consecutive or concurrent sentences pursuant to Ark. Code Ann. § 5-4-403(a), (d), and defense counsel's closing argument that suggested that defendant's multiple sentences automatically ran consecutively was an incorrect statement of the law. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

Merger of two capital murders was not required under § 5-1-110(d)(1), and where defendant waived a sentencing hearing, thereby giving the trial court sole sentencing authority under § 5-4-103(b)(4), the trial court had the authority to order defendant's sentences to run consecutively under § 5-4-403(a). *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

Subsection (d) states that the court is not bound by the recommendations as to consecutive or concurrent sentencing options of the jury, the decision of whether to impose consecutive or concurrent sentences was solely within the province of the trial judge; where the jury did not make a recommendation as to whether the sentences should run consecutively or concurrently, the trial court did not abuse its discretion in denying defendant's motions for a mistrial. *Smith v. State*, 85 Ark. App. 475, 157 S.W.3d 566 (2004).

Evidence.

Evidence in the form of testimony of a mother and her daughter and son, both of whom were under the age of 14, that defendant, who was husband and father to the victims, sexually assaulted the daughter by inserting his finger into the daughter's vagina and forcing the daughter to perform oral sex on defendant, forcing the son and daughter to have sexual intercourse, and forcing the son to have intercourse with the mother, along with medical evidence of injuries to the daughter consistent with sexual assault, sup-

ported defendant's conviction for rape and three counts of accomplice to rape as an accomplice. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

Filing Fees.

This section is not relevant to question of whether an appellant must pay a filing fee on appeal of both misdemeanor and felony charges. *Langley v. State*, 343 Ark. 324, 34 S.W.3d 364 (2001).

Misdemeanors.

Where defendant was convicted of two counts of misdemeanor possession of marijuana, and was sentenced to 18 months probation, his sentence violated subdivision (c)(2) of this section which provides that the aggregate of consecutive terms for misdemeanors shall not exceed one year; the one year maximum is applicable to the defendant's probationary sentence by virtue of § 5-4-306(a). *Brunson v. State*, 45 Ark. App. 161, 873 S.W.2d 562 (1994).

Under this section, a trial court lacks the authority to impose an aggregate sentence of more than one year for the two misdemeanor offenses or to run misdemeanor sentences consecutively with the felony sentences. *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997).

Cited: *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977); *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717 (1980); *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980); *Beavers v. Lockhart*, 755 F.2d 657 (8th Cir. 1985); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); *Fitzhugh v. State*, 293 Ark. 315, 737 S.W.2d 638 (1987); *Pettit v. State*, 296 Ark. 423, 758 S.W.2d 1 (1988); *Lee v. State*, 299 Ark. 187, 772 S.W.2d 324 (1989); *Moore v. State*, 299 Ark. 532, 773 S.W.2d 834 (1989); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994); *Aaron v. State*, 319 Ark. 320, 891 S.W.2d 364 (1995); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997); *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

5-4-404. Credit for time spent in custody.

If a defendant is held in custody for conduct that results in a sentence to imprisonment or confinement as a condition of suspension or probation, the court, the Department of Correction, or the Department of Community Correction shall credit the time spent in custody against

the sentence, including time spent in a local jail facility awaiting transfer to the Department of Correction or the Department of Community Correction.

History. Acts 1975, No. 280, § 904; A.S.A. 1947, § 41-904; Acts 2001, No. 1034, § 1.

Amendments. The 2001 amendment inserted "or confinement as a condition of

suspension or probation" and "the Department of Correction, or the Department of Community Correction" and substituted "custody against ... Community Correction" for "custody against the sentence."

CASE NOTES

ANALYSIS

Entitlement to credit.
Unrelated charges.

Entitlement to Credit.

Defendant was held entitled to credit for the number of days spent in jail from the date of his arrest on an alias warrant to the date of his conviction. *Hodges v. State*, 267 Ark. 1112, 593 S.W.2d 494 (Ct. App. 1980).

Jail time credit is appropriate when a defendant's pretrial incarceration is due to his inability to make bail, but is inappropriate for time served in connection with wholly unrelated charges based on conduct other than for which the defendant is ultimately sentenced. *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

Defendant should have received credit on his revoked suspended sentence for the days he spent in custody awaiting trial on another charge that resulted in a suspended sentence but was not entitled to credit for jail time spent for the crime underlying the revocation of the suspended sentence. *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

Court held that the defendant had not demonstrated his entitlement to credit for the time. *Coleman v. State*, 15 Ark. App. 5, 688 S.W.2d 313 (1985); *Humphrey v. State*, 300 Ark. 383, 779 S.W.2d 530 (1989).

This section provides for jail time credit against sentence where pretrial incarceration was imposed due to conduct that resulted in conviction and sentence. Defendant was not entitled to credit for jail time served as a fugitive while awaiting return to Arkansas. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

A defendant is not entitled to jail credit on a subsequent sentence for time spent in jail on a parole revocation, even if the parole revocation results from the crime for which he receives a subsequent sentence. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

Time spent enrolled in an electronic monitoring program is not time spent "in custody" for purposes of the statute; time spent "in custody" under the statute is available only to those persons who remain in the custody of a penal institution. *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999).

Unrelated Charges.

Where the defendant was incarcerated in another state because he was a fugitive from justice in this state and he had committed other crimes in the other state, the reasons for incarceration in the other state were wholly unrelated to the conduct that resulted in the defendant's sentence in this state; consequently, the defendant could not receive any credit for the period of time that he was incarcerated in the other state. *Cox v. State*, 288 Ark. 300, 705 S.W.2d 1 (1986).

The defendant was not entitled to credit for time in jail for an unrelated charge. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986); *Travis v. State*, 292 Ark. 463, 730 S.W.2d 501 (1987); *Jones v. State*, 301 Ark. 510, 785 S.W.2d 217, *supp. op.*, 301 Ark. 512-A, 789 S.W.2d 730 (1990).

Cited: *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979); *Carey v. State*, 268 Ark. 332, 596 S.W.2d 688 (1980); *Elliott v. State*, 268 Ark. 454, 597 S.W.2d 76 (1980); *Walters v. State*, 267 Ark. 155, 621 S.W.2d 468 (1979); *Griffin v.*

State, 2 Ark. App. 145, 617 S.W.2d 21 (1981); Hughes v. State, 3 Ark. App. 275, 625 S.W.2d 547 (1981); Hughes v. State,

281 Ark. 428, 664 S.W.2d 471 (1984); Travis v. Lockhart, 925 F.2d 1095 (8th Cir. 1991).

SUBCHAPTER 5 — EXTENDED TERM OF IMPRISONMENT

SECTION.

5-4-501. Habitual offenders — Sentencing for felony.

5-4-502. Habitual offenders — Sentencing procedure.

5-4-503. Habitual offenders — Previous

SECTION.

conviction in another jurisdiction.

5-4-504. Habitual offenders — Proof of previous conviction.

5-4-505, 5-4-506. [Repealed.]

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1983, No. 409, § 6: July 1, 1983. Emergency clause provided: "It is hereby determined by the General Assembly that certain criminal sentencing statutes are in need of immediate clarification for the more efficient administration of justice in this State. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1983."

Acts 1993, Nos. 532 and 550, § 13: Mar. 16, 1993. Emergency clause provided: "It

is hereby found and determined by the General Assembly of the State of Arkansas that the sentencing policies and standards of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect, unless provided for otherwise herein, from and after its passage and approval."

RESEARCH REFERENCES

ALR. Statute or ordinance mandating imprisonment for habitual or repeated offender. 2 ALR 4th 618.

Using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence. 37 ALR 4th 1168.

Am. Jur. 39 Am. Jur. 2d, Habit. Crim., § 19 et seq.

Ark. L. Rev. Griffin, Case Notes: Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604: The Relationship Between Prosecutorial Discretion and Vindictiveness in Plea Bargaining, 33 Ark. L. Rev. 211.

Note, Helm v. Solem: Can a Prison Sentence Constitute Cruel and Unusual Punishment?, 36 Ark. L. Rev. 673.

Notes, Shockley v. State: The Constitutionality of the Arkansas Habitual Offender Determination Procedure, 39 Ark. L. Rev. 553.

Note, Conley v. State: Mitigation Before Guilt, 45 Ark. L. Rev. 995.

C.J.S. 24 C.J.S., Crim. L., § 1638 et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 5 UALR L.J. 115.

CASE NOTES

ANALYSIS

Purpose.
 Applicability.
 Information.
 Jury trial.
 Single criminal act.

Purpose.

The obvious intent of this subchapter is to enhance punishment of a party who has a habit of criminal conduct. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

The legislature intended the focus of this subchapter to be on prior convictions, not on prior sentences. *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

This subchapter was not designed to act as a deterrent but as a punitive statute which provides that, in appropriate cases, a prior conviction, regardless of the date of the crime, may be used to increase punishment. *Jackson v. State*, 47 Ark. App. 86, 885 S.W.2d 303 (1994).

Applicability.

The General Assembly did not intend the new, reduced sentences in the 1993 amendment to apply to felonies committed after June 30, 1983, but to make them applicable to felonies committed after June 30, 1993. *State v. Dennis*, 318 Ark.

80, 883 S.W.2d 811 (1994); *State v. Brummett*, 318 Ark. 220, 885 S.W.2d 8 (1994).

Information.

The trial court properly allowed the prosecutor to amend the information to charge defendant as a habitual offender after the conclusion of plea negotiations. *Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995).

Jury Trial.

Defendant's right to a trial by jury was not unduly encumbered by the Habitual Offender Act. *Walker v. State*, 314 Ark. 628, 864 S.W.2d 230 (1993).

Single Criminal Act.

To utilize prior convictions arising from one single act to enhance punishment pursuant to the Habitual Offender Act contravenes fundamental fairness and due process. Simply put, there is nothing habitual about the commission of a single criminal act resulting in multiple charges and convictions. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Cited: *Leggins v. Lockhart*, 822 F.2d 764 (8th Cir. 1987); *Adams v. State*, 314 Ark. 431, 863 S.W.2d 285 (1993); *McClish v. State*, 331 Ark. 295, 962 S.W.2d 332 (1998).

5-4-501. Habitual offenders — Sentencing for felony.

(a)(1) A defendant meeting the following criteria may be sentenced to an extended term of imprisonment as set forth in subdivision (a)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than those enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies or who has been found guilty of more than one (1) but fewer than four (4) felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (c) of this section or who has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (c) of this section;
 or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (d) of this section or has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendants described in subdivision (a)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than sixty (60) years, or life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than fifty (50) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than thirty (30) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than twenty (20) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than twelve (12) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than five (5) years more than the maximum sentence for the unclassified felony; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(b)(1) A defendant meeting the following criteria may be sentenced to an extended term of imprisonment as set forth in subdivision (b)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than a felony enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of four (4) or more felonies or who has been found guilty of four (4) or more felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (c) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (d) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (b)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than sixty (60) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than forty (40) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than thirty (30) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than fifteen (15) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than two (2) times the maximum sentence for the unclassified felony offense; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(c)(1) A defendant who is convicted of a serious felony involving violence enumerated in subdivision (c)(2) of this section and who has previously been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section shall be sentenced:

(A) To imprisonment for a term of not less than forty (40) years nor more than eighty (80) years, or life; and

(B) Without eligibility for parole or community correction transfer except under § 16-93-1302.

(2) As used in this subsection, "serious felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102, involving an activity making it a Class Y felony;

(iv) Aggravated robbery, § 5-12-103;

(v) Rape, § 5-14-103;

(vi) Terroristic act, § 5-13-310, involving an activity making it a Class Y felony; or

(vii) Causing a catastrophe, § 5-38-202(a); or

(B) A conviction of a comparable serious felony involving violence from another jurisdiction.

(3)(A) The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the serious felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the serious felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of a prior serious felony involving violence and shall determine the number of prior serious felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (c)(3)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior convictions for a serious felony involving violence and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior serious felony involving violence conviction and the date and place of a prior serious felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated serious felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(d)(1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who has previously been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section shall be sentenced to an extended term of imprisonment without eligibility for parole or community correction transfer except under § 16-93-1302 as follows:

(A) For a conviction of a Class Y felony, a term of of imprisonment of not less than life in prison;

(B) For a conviction of a Class A felony, a term of of imprisonment of not less than forty (40) years nor more than life in prison;

(C) For a conviction of a Class B felony or for a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment of not less than thirty (30) years nor more than sixty (60) years;

(D) For a conviction of a Class C felony, a term of of imprisonment of not less than twenty-five (25) years nor more than forty (40) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not less than twenty (20) years nor more than forty (40) years; and

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than three (3) times the maximum sentence for the unclassified felony offense.

(2) As used in this subsection, "felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102;

(iv) Aggravated robbery, § 5-12-103;

- (v) Rape, § 5-14-103;
- (vi) Battery in the first degree, § 5-13-201;
- (vii) Terroristic act, § 5-13-310;
- (viii) Sexual abuse in the first degree, § 5-14-108 [repealed];
- (ix) Violation of a minor in the first degree, § 5-14-120 [repealed];
- (x) Sexual assault in the first degree, § 5-14-124;
- (xi) Sexual assault in the second degree, § 5-14-125;
- (xii) Domestic battering in the first degree, § 5-26-303;
- (xiii) Unlawful discharge of a firearm from a vehicle, § 5-74-107;
- (xiv) Criminal use of prohibited weapons, § 5-73-104, involving an activity making it a Class B felony; or
- (xv) A felony attempt, solicitation, or conspiracy to commit:
 - (a) Capital murder, § 5-10-101;
 - (b) Murder in the first degree, § 5-10-102;
 - (c) Murder in the second degree, § 5-10-103;
 - (d) Kidnapping, § 5-11-102;
 - (e) Aggravated robbery, § 5-12-103;
 - (f) Rape, § 5-14-103;
 - (g) Battery in the first degree, § 5-13-201; or
 - (h) Domestic battering in the first degree, § 5-26-303; or
- (B) A conviction of a comparable felony involving violence from another jurisdiction.

(3)(A) The following procedure governs a trials at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of two (2) or more prior felonies involving violence and shall determine the number of prior felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (d)(3)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior felony involving violence convictions and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior felony involving violence conviction and the date and place of a prior felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(e)(1) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary, § 5-39-201, and of the felony that was the object of the burglary are considered a single felony conviction or finding of guilt.

(2) A conviction or finding of guilt of an offense that was a felony under the law in effect prior to January 1, 1976, is considered a previous felony conviction or finding of guilt.

(f) For the purposes of determining whether a defendant has previously been convicted of a serious felony involving violence or a felony involving violence under subsections (c) and (d) of this section, the entry of a plea of guilty or nolo contendere or a finding of guilt by a court to a felony enumerated in subsections (c) and (d) of this section, respectively, as a result of which a court places the defendant on a suspended imposition of sentence, a suspended sentence, or probation, or sentences the defendant to the Department of Correction, is be considered a previous felony conviction.

(g) Any defendant deemed eligible to be sentenced under a provision of both subsections (c) and (d) of this section shall be sentenced only under subsection (d) of this section.

(h) If the provisions of subsection (c) or (d) of this section, or both, are held invalid by a court, the defendant's case shall be remanded to the trial court for resentencing of the defendant under the provisions of subsections (a) and (b) of this section.

History. Acts 1975, No. 280, § 1001; 1977, No. 474, § 4; 1981, No. 620, § 9; 1983, No. 409, § 3; A.S.A. 1947, § 41-1001; Acts 1993, No. 532, § 7; 1993, No. 550, § 7; 1995, No. 1009, § 1; 1995, No. 1011, § 1; 1997, No. 1197, § 1; 2001, No. 1553, § 6; 2003, No. 1390, § 2.

Amendments. The 2001 amendment inserted present (a)(1), (a)(2), (b)(1) and (b)(2) and redesignated former (a)(1)-(3) and (b)(1)-(3) as present (a)(1)(A)-(C) and (b)(1)(A)-(C); inserted "of this section" preceding "committed after" in (a)(1)(C); deleted "may be sentenced to an extended term of imprisonment as follows" at the

end of (a)(1)(C) and (b)(1)(C); substituted "this subsection" for "§ 5-4-501(c)" in (c)(3)(A); redesignated former (c)(3)(A)(1)-(4) as present (c)(3)(A)(i)-(iv) and made related changes; substituted "this subsection" for "§ 5-4-501(d)" in (d)(3)(A); redesignated former (d)(3)(A)(1)-(4) as present (d)(3)(A)(i)-(iv) and made related changes; inserted "§ 5-39-201" in (e)(1); and made minor stylistic changes throughout.

The 2003 amendment inserted present (d)(2)(A)(x) and (xi); and redesignated former (d)(2)(A)(x)-(xii) as present (d)(2)(A)(xii)-(xv).

RESEARCH REFERENCES

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Survey — Criminal Law, 11 UALR L.J. 175.

CASE NOTES

ANALYSIS

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Constitutionality.

Defendant had no standing to challenge the ambiguity of subsection (d) of this section where he received the benefit of the more liberal of the two possible interpretations. *Nahlen v. State*, 330 Ark. 1, 953 S.W.2d 877 (1997).

This section is not unconstitutionally vague and does not violate the due process clause. *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998).

There is a rational basis for enacting the enhancement provision in subsection (d) and, therefore, any perceived "conflict" between this section and any other statute allowing the jury to sentence to the same punishment does not create a constitutional violation. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

The imposition of a life sentence under subsection (d) for aggravated robbery and theft of property did not constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution or Ark. Const., Art. 2, § 9. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

Subsection (d)(3), by which the legislature enacted a mandatory sentence, does not violate the separation of powers doctrine in either the federal or state constitutions and does not constitute a bill of attainder. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

As the three-strikes law was in effect when defendant committed armed robbery and his life sentence was in accordance with that provision, that his prior convictions occurred before enactment of subsection (d) was immaterial. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004).

In General.

This section does not create a distinct additional offense or independent crime but simply affords evidence to increase the punishment and to furnish a guide for the court or jury in fixing the final punishment in event of conviction of the offense charged. *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977).

Habitual criminal statute was not designed to act as a deterrent, but is simply a punitive statute, which provides in clear language that in an appropriate case, a prior conviction, regardless of the date of the crime, may be used to increase punishment. *Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981); *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983); *Spivey v. State*, 25 Ark. App. 269, 757 S.W.2d 186 (1988).

Sentencing in Arkansas is entirely a matter of statute. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Enhancement statute was not a distinct additional offense, but rather it provided a guide for the court or jury in fixing final punishment on the charged offense. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), cert. denied, 536 U.S. 909, 122 S. Ct. 2366, 153 L. Ed. 2d 187 (2002).

Construction.

Because § 16-90-803, although enacted at a later date, contains no repealing clause and does not conflict with this section, the state has the option of alleging specific habitual status in the information or simply charging the underlying offense. *Mackey v. State*, 56 Ark. App. 164, 939 S.W.2d 851 (1997), reversed on other

grounds by 329 Ark. 229, 947 S.W.2d 359 (1997).

This section, requiring that one who has previously been convicted of two or more violent felonies and who is then convicted of rape is to be sentenced to life imprisonment without parole, is not in conflict with § 5-4-103(a), providing that a jury is to fix punishment of one found guilty of a felony, because of the additional language of the latter that the jury is to fix punishment "as authorized by this chapter." *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997).

This section is ambiguous: subdivision (d)(1) contains the words "separate and distinct prior occasions" but subdivision (d)(3)(A) does not, and each of those subdivisions purports to provide when the three-strikes enhancement applies. *Nahlen v. State*, 330 Ark. 1, 953 S.W.2d 877 (1997).

This section comes into play only upon a showing of "more than one" previous conviction of a felony. *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979).

Section 5-64-408, which was enacted after this section, does not preclude sentencing a habitual criminal under this section. When two punishment statutes exist, a court is not prevented from using the more stringent provision. *Russell v. State*, 295 Ark. 619, 751 S.W.2d 334 (1988).

The June 30, 1983, time limit is applicable only to the conviction being enhanced, and not to prior convictions being used for enhancement purposes. *Spivey v. State*, 25 Ark. App. 269, 757 S.W.2d 186 (1988).

The intent of the General Assembly was to apply Acts 1993, No. 550, § 7 to crimes committed by habitual offenders after June 30, 1993, thus coinciding with its effective date of July 1, 1993; to hold otherwise would risk disproportionate sentences being imposed on habitual offenders who committed crimes between 1983 and 1993, yet were sentenced pursuant to different versions of this section depending upon the date of trial. *Neely v. State*, 317 Ark. 312, 877 S.W.2d 589 (1994).

The General Assembly did not intend the new, reduced sentences in the 1993 amendment to apply to felonies committed after June 30, 1983, but to make them applicable to felonies committed after

June 30, 1993. *State v. Dennis*, 318 Ark. 80, 883 S.W.2d 811 (1994); *State v. Brummett*, 318 Ark. 220, 885 S.W.2d 8 (1994).

The General Assembly intended to apply the 1993 reduced sentencing guidelines to felonies committed after June 30, 1993; the reference to 1983 in subsection (a) was a drafting error. *State v. Kinard*, 319 Ark. 360, 891 S.W.2d 378 (1995); *State v. Rodriques*, 319 Ark. 366, 891 S.W.2d 63 (1995).

The date of the offense is immaterial to the application of subsection (d)(1), which permits enhancement for prior convictions with offenses committed subsequent to the charged offense. *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001).

Defendant's sentence was not authorized under § 5-65-111(b)(4) because the trial court used the habitual offender statute, § 5-4-501(a)(2)(F) in conjunction with the DWI sentencing enhancement provision; therefore, his sentence was properly modified from 15 to 10 years imprisonment. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

The appellate court presumed that, when amending this section in 1997, the legislature was fully aware of the Arkansas Supreme Court's interpretation of this section as requiring convictions arising from separate criminal acts, and that it was the legislature's intent to abandon this interpretation by omitting the "separate and distinct prior occasion" language. *Benson v. State*, 86 Ark. App. 154, 164 S.W.3d 495 (2004).

Appeals.

Objections to the form of the information used to charge the defendant, to the introduction of a certified copy of a docket sheet to prove one of the defendant's prior felony convictions, and a claim of counsel's failure to object to the introduction of the docket sheet constitutes ineffective assistance of counsel could not be raised for the first time on appeal. *Rogers v. State*, 289 Ark. 257, 711 S.W.2d 461 (1986).

Petitioner held entitled to remand of case for an evidentiary hearing on his claims of ineffective assistance of counsel and improper sentencing under this section, though issues were not raised in his pro se petition. *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988).

While it is true that a defendant's right

to due process of law requires that he receive notice prior to trial of the filing of an habitual offender charge, it is also true that a denial of any right, even a constitutional one, must be objected to at trial to be preserved for appeal. *Kittler v. State*, 304 Ark. 344, 802 S.W.2d 925 (1991).

A bench-trial contemporaneous objection to challenge the existence of prior convictions to establish habitual offender status is required to preserve the issue for appeal. *Mackey v. State*, 329 Ark. 229, 947 S.W.2d 359 (1997).

Defendant's argument that the appellate court could address his habitual offender status on appeal because it involved an illegal sentence, rather than the sufficiency of the evidence supporting the trial court's finding that he was an habitual offender, was without merit; defendant's argument was not preserved for appellate review because he failed to object to the proof of his habitual offender status during his sentencing. *Jones v. State*, 83 Ark. App. 195, 119 S.W.3d 70 (2003).

Classification of Offense.

The enhancement provided for under this section is greater when § 5-64-401(c) is first applied to enhance the offense class. *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993).

Convictions.

—In General.

Suspended sentences are still "convictions" within the meaning of the habitual criminal law. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, cert. denied, 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978).

This section does not require that the defendant has previously been sentenced to serve a jail sentence; rather, it is enough if he has been found guilty and been put on probation. *Campbell v. State*, 264 Ark. 575, 572 S.W.2d 845 (1978).

Since subsection (b) refers to convictions rather than confinements, each conviction, which is one of two or more sentences which were served concurrently, must be counted separately in determining the sentence that may be imposed. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

Where the state introduced certified copies of previous judgments for purposes

of enhancing the defendant's sentence, even though one of the judgments reflected a different last name from that of the defendant, there was still substantial evidence to support the jury's finding that the defendant had suffered that conviction. *Elmore v. State*, 268 Ark. 225, 595 S.W.2d 218 (1980).

Where the information filed against the defendant merely alleged that the defendant had been convicted of "two or more" prior felonies, only two prior convictions could be admitted against the defendant for the purpose of increasing his sentence since only the prior convictions alleged can be used. *Clinkscale v. State*, 269 Ark. 324, 602 S.W.2d 618 (1980). But see *Reed v. State*, 282 Ark. 492, 669 S.W.2d 192 (1984).

Where there was evidence introduced at the trial that the defendant had been convicted and sentenced on three prior felony offenses, it is clear that defendant was correctly charged with having been convicted of "more than one" felony offense as provided in this section. *Terry v. State*, 271 Ark. App. 715, 610 S.W.2d 272 (1981).

Each plea of guilty to separate offenses constitutes a separate prior conviction for purposes of the habitual offender statute under subsection (b). *Blackmon v. State*, 272 Ark. 157, 612 S.W.2d 319 (1981); *Knight v. State*, 277 Ark. 213, 640 S.W.2d 442 (1982).

Where defendant had a prior felony conviction in another state and conviction for an offense which occurred prior to present offense, but conviction was entered subsequent to the present offense, the defendant should be subject to the harsher punishment of an habitual criminal under this section which applies to defendants who have been convicted of more than one but less than four previous felonies. *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981).

A court probation proceeding does not constitute either a "conviction" or "finding of guilt" under this section until the original guilty plea is finally accepted and therefore is inadmissible for sentence enhancement purposes in a subsequent prosecution. *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981).

Where two of the prior convictions were for offenses committed prior to the commission of the instant offense, those convictions could be used to enhance the

punishment even though the convictions were not obtained until after the commission of the instant offense. *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983).

Where evidence of three prior convictions were before the court, defendant's contention that charges in two of the convictions arose out of the same incident was of no consequence because there was clear evidence of two prior felony convictions before the court and there was no indication that defendant had been prejudiced by introduction of the convictions. *Andrews v. State*, 283 Ark. 297, 675 S.W.2d 636 (1984).

An amended information which alleged that the defendant had more than two prior convictions merely tracked the language of the sentence enhancement statute and did not limit the state to proving only two prior felonies. *Reed v. State*, 282 Ark. 492, 669 S.W.2d 192 (1984). But see, *Clinkscale v. State*, 269 Ark. 324, 602 S.W.2d 618 (1980).

The mere fact that some of the prior felony offenses may have been committed in one escapade does not necessarily make them one crime for purposes of enhancement of sentence as an habitual offender. *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985).

Even though a defendant's prior felony convictions were on appeal, they were final for purposes of enhancing his sentence as an habitual offender. *Hill v. State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985).

Where the defendant had four prior felony convictions, the three concurrent 75-year terms of imprisonment for the three counts of delivery of controlled substances were not excessive. *Parker v. State*, 290 Ark. 94, 717 S.W.2d 197 (1986).

For purposes of sentence enhancement, a conviction is final when judgment is pronounced, and prior convictions on appeal may be used for sentence enhancement. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987).

For purposes of this section, there is no distinction between "two or more" and "more than two", or "four or more" and "more than four," and if state alleges "four or more," there is no limit to number which may be proven. But it would be error to allow the state to prove "four or more" priors when the information charges the defendant with only "two or

more" felonies, because a more severe range of punishment for the offense is invoked when four or more priors are established. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987).

Trial court erroneously allowed four prior felony convictions to be admitted when information alleged only two or more prior convictions. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987).

Breaking and entering at three separate locations constitutes three separate offenses for the purpose of showing that a defendant has been convicted of more than one but less than four felonies and should have his sentence enhanced in accordance with subsection (a). *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989).

The fact that defendant was granted probation on prior convictions does not lessen the fact that they were convictions satisfying the criterion of subsection (a). *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989).

State's use of defendant's prior conviction to prove the first element of the crime of being in possession of a firearm, and its use of the same prior conviction to enhance defendant's punishment as an habitual offender did not constitute a prohibited form of double-counting. *Woodson v. State*, 302 Ark. 10, 786 S.W.2d 120 (1990).

Where evidence of prior offenses showed the entry of a plea of nolo contendere and indicated that the defendant was placed on five years statutory probation, but there was no indication in any of the documents that the court refused to accept the defendant's plea, formally or otherwise, defendant's probation was not the type of court probation which could be excluded from evidence on the basis that it did not involve a finding of guilt. *Stevens v. State*, 38 Ark. App. 209, 832 S.W.2d 275 (1992).

Trial court properly allowed enhancement of defendant's sentence under the Habitual Offenders Act where the record reflected that the defendant was found guilty by a jury of two offenses, sentenced to terms of imprisonment and that trial court entered a conviction judgment committing defendant to Arkansas Department of Correction. *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996).

Trial court did not err in admitting certain of defendant's prior convictions for

sentence-enhancement purposes where they occurred after the offenses in the present case, but defendant was convicted of them before his conviction in this case. *Dodson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 494 (Sept. 16, 2004).

—Burglary.

Provision of this section that a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt is the only instance in the habitual offender act where the legislature specifically provided for two convictions to be treated as one, and the purpose of the provision seems clearly limited; accordingly, the argument that prior convictions arose from continuing course of conduct since the crimes occurred on the same day with the same victim and that, as they were not separate occurrences, the trial court should have considered them as only one conviction for the purpose of applying the habitual offender statute, was without merit. *Wesson v. State*, 5 Ark. App. 154, 633 S.W.2d 713 (1982).

Subsection (c) provides that a conviction of burglary and the felony that was the object of the burglary shall be considered a single felony conviction; the state legislature did not intend for any other convictions to merge for purposes of recidivist treatment. *Glick v. Lockhart*, 770 F.2d 737 (8th Cir. 1985), cert. denied, 474 U.S. 1084, 106 S. Ct. 857, 88 L. Ed. 2d 897 (1986).

It was error to count a defendant's conviction of burglary and theft arising out of a single episode as separate offenses for purposes of enhancement as an habitual offender. *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985).

The General Assembly intended to treat convictions for breaking or entering the object of which was theft as a single felony for enhancement purposes under subsection (c) of this section. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993).

The term "burglary" in subsection (c) of this section includes the lesser included offense of breaking or entering, and breaking or entering and the object of that offense — in this case, theft — should be considered a single felony conviction for purposes of enhancing punishment. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993).

Where defendant was sentenced to an extended term of imprisonment as a habitual offender with more than one but less than four felony convictions under this section, the trial court erred by not merging his prior convictions for breaking or entering and for theft of property into a single felony conviction for enhancement purposes. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993).

—Invalidity.

Unless the records of prior convictions show that the defendant was represented by counsel, there is a presumption that the defendant was denied assistance of counsel and the convictions cannot be used to enhance punishment under recidivist statutes. *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), aff'd, 615 F.2d 489 (8th Cir. 1980); *Stewart v. State*, 300 Ark. 147, 777 S.W.2d 844 (1989).

Where the testimony of the circuit clerk, which was supported by the docket sheet, showed that the plea of guilty was accepted by the court only after defendant had conferred with counsel, and where the intent of the court to appoint that counsel was clear, the failure to use the word "appoint" did not destroy the validity of the guilty plea. *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), aff'd, 615 F.2d 489 (8th Cir. 1980).

A jury assessing punishment under a state habitual criminal statute may not constitutionally enhance punishment by reference to a previous conviction that had been obtained in violation of a constitutional right of the defendant, such as the right to counsel protected by the Sixth and Fourteenth Amendments to the Constitution of the United States; and, where a state court record reflects that a jury in imposing an enhanced term of imprisonment on a person convicted of being an habitual criminal considered or may have considered a constitutionally invalid prior conviction, the habitual criminal sentence that was imposed must generally be set aside and the case sent back to the sentencing court for appropriate proceedings. *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980).

Where in sentencing defendant, the statements of defendant following his arrest to a police officer giving a detailed account of prior felony convictions, and the use of the officer's testimony without

evidence being offered as to whether or not defendant was represented by counsel on any of his prior convictions so as to possibly render them constitutionally infirm, clearly violated a substantial right of the defendant and constituted error under § 16-41-101, Rule 103, thus requiring a new trial. *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981), overruled on other grounds by *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

Where accused insisted that the state failed to show that he had been represented by counsel in his five prior convictions in another state, but the evidence indicated that the defendant's judgment and sentence forms clearly stated that the defendant had been represented by an attorney at all appearances, the prior foreign convictions were properly used for enhancement purposes. *Knight v. State*, 277 Ark. 213, 640 S.W.2d 442 (1982).

—Juvenile Adjudications.

A prior juvenile delinquency adjudication cannot be considered as a conviction for purposes of sentence enhancement as a habitual offender. *Vanesch v. State*, 70 Ark. App. 277, 16 S.W.3d 306 (2000).

—Misdemeanors.

A misdemeanor, no matter how frequent, should not be treated as a substitute for one of the predicate felony convictions used for habitual offender statutes. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988).

Use of a felony, which would otherwise be only a misdemeanor and becomes a felony simply by virtue of its repetition (for example a conviction under § 5-65-111(b)(3)), for habitual offender purposes, is specifically condemned. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988).

Legislature did not intend that the specific criminal enhancement statute for driving while intoxicated, § 5-65-111, should be coupled with this section, the general criminal enhancement statute, for the resulting purpose of creating a greater sentence than if either statute had been applied singly. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988).

—Related Offenses.

Felony convictions for the related offenses of possession of a controlled substance under § 5-64-401 and possession of drug paraphernalia under § 5-64-403 fall

under two separate statutes and are not considered one offense for the purposes of sentencing under this section. *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993).

Convictions for two drug offenses on the same day, while probably related, did not count as only one prior felony conviction for the purposes of sentence enhancement. *Jackson v. State*, 47 Ark. App. 86, 885 S.W.2d 303 (1994).

Cruel and Unusual Punishment.

Doubling a sentence for a person convicted twice for a drug-related offense is not cruel and unusual punishment. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

Where defendant had prior felony convictions and was convicted of four separate counts of an offense, sentence was neither an abuse of discretion nor cruel and unusual punishment. *Duncan v. State*, 267 Ark. 41, 588 S.W.2d 432 (1979).

Double Jeopardy.

Application of this section does not constitute double jeopardy. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

The state can use the defendant's prior felony convictions to convict him of felony in possession of a firearm and then use the same prior felony convictions to enhance the penalty for that conviction. The defendant was not convicted of two offenses which share the same elements, and thus he was not twice put in jeopardy for the same offense. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Effect of Amendments.

The 1993 amendment amends this section such that the minimum sentences for habitual offenders are equal to the minimum sentences for non-habitual offenders. *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

Impermissible Classifications.

Charges brought under the Habitual Offender Act based on an impermissible classification such as race would, of course, be unconstitutional. *Beavers v. Lockhart*, 755 F.2d 657 (8th Cir. 1985).

Information.

Amendment of an information to increase allegations from two to three prior felony convictions did not increase the statutory punishment range and did not

result in prejudice sufficient to warrant a new trial. *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994).

On remand of defendant's criminal conviction for aggravated robbery and felon in possession of a firearm, the state was permitted to file an amended information alleging defendant's habitual-offender status pursuant to this section as defendant had been convicted of four counts of rape and one count of aggravated robbery in a separate case. *Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003).

Instruction.

Where at least two prior convictions were admitted by a defendant, it was not error to refuse to instruct the jury with regard to the range of punishment if no such convictions were shown. *Wilson v. State*, 262 Ark. 339, 556 S.W.2d 657 (1977).

Where the state offered proof that the defendant in a capital felony murder case had been convicted of five prior felonies, two of which involved threats or violence, the trial court did not err in allowing the state to prove all five prior felonies where the court clearly instructed the jury that they were to consider only the two convictions involving threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Defendant was not prejudiced by jury instruction nor by his attorney's failure to object to the instruction which incorrectly stated the number of prior convictions required where the defendant testified he had been convicted of the number of convictions stated as required in the erroneous instruction. *Grooms v. Lockhart*, 919 F.2d 505 (8th Cir. 1990).

The sensible meaning of the habitual offender statute is to give the jury discretion to sentence only within the parameters set out in the statute; therefore, the statute does not permit an instruction of penalties under the non-habitual offender statute. *McKillion v. State*, 306 Ark. 511, 815 S.W.2d 936 (1991).

In defendant's drug case, the court erroneously instructed the jury regarding penalties in the sentencing phase where it

allowed for the jury to consider only the possibility of imprisonment when defendant was an habitual offender; the court failed to give the jury the option of considering only the payment of a fine, as authorized by § 5-4-104(d)(3). *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Mandatory Sentences.

The minimum sentences for habitual offenders are mandatory. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

The trial court exceeded its authority by ignoring the dictates of § 5-4-104(a) and by suspending imposition of five of six years contrary to the mandate of by subdivision (a)(4). *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Sentencing under this section is mandatory, not optional. *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

The word "may" in this section indicates that the jury or the trial court, whichever is considering the sentence to be imposed, has only the discretion to sentence an accused within the range of punishment set out in the recidivist statute. *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

Notice of Charge.

Where defendant was on parole from former convictions, and had been advised during plea negotiations that habitual criminal charges would be filed, he was not in a position to complain of prejudice or allege surprise. *Duke v. State*, 266 Ark. 697, 587 S.W.2d 570 (1979).

The purpose of the requirement in habitual criminal cases that the state allege the previous offenses in the indictment is to afford the defendant notice and give him an opportunity to refute the charges. *Reed v. State*, 282 Ark. 492, 669 S.W.2d 192 (1984).

The defendant's argument that an allegation in an information of "more than two" prior convictions was too vague to inform a defendant adequately of the charge against him was without merit because the defendant was placed on notice by the amended information that he was being charged as an habitual offender with a minimum of three convictions. *Reed v. State*, 282 Ark. 492, 669 S.W.2d 192 (1984).

An amended information alleging two

or more previous felony convictions put defendant on notice that he would have to defend at least two convictions. *Stephens v. State*, 15 Ark. App. 352, 693 S.W.2d 64 (1985).

Where defendant was put on notice that the state intended to make an amendment to the information to enhance defendant's punishment through the habitual offender statute, and the defendant was not surprised when the trial court allowed the information to be amended so as to allow for enhancement of his punishment upon conviction, it was not error for the state to amend its information, charging appellant as a habitual criminal, on the day of trial. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Proof.

A prior judgment of conviction, based on a guilty plea, for the purposes of this section, need not show the plea was freely and voluntarily made, since it is assumed that such was the case when the defendant was represented by an attorney, unless the contrary is shown. *Brown v. State*, 264 Ark. 248, 570 S.W.2d 251 (1978).

The burden was upon the prosecution to offer proof showing that the attending felonies were not the objects of their respective burglaries so as to constitute separate prior convictions and avoid the provisions of subsection (c). *Steffen v. State*, 267 Ark. 402, 590 S.W.2d 302 (1979).

The burden is on the prosecution to offer proof that the attending felony is not the object of the burglary and where no such proof was shown by the state, defendant's prior conviction of burglary and theft could only be counted as one offense and would not support an enhanced sentence. *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891 (1980); *Walker v. Lockhart*, 807 F.2d 136 (8th Cir. 1986).

A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

This section only requires proof of a prior conviction, not the underlying elements of the conviction. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Where the defendant had three prior

convictions in another state and all three convictions were punishable by imprisonment of a term in excess of one year, the evidence was sufficient to support the extended term under this habitual offender statute. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

For the purpose of sentence enhancement, the state may prove a prior conviction by any evidence that satisfies the court beyond a reasonable doubt that the defendant was convicted or found guilty. *Stewart v. State*, 300 Ark. 147, 777 S.W.2d 844 (1989).

A record of a prior conviction may be used for enhanced sentencing purposes if the record of such conviction shows on its face that the accused was represented by counsel at the time of the plea. *Robinson v. State*, 314 Ark. 243, 861 S.W.2d 548 (1993).

The state's failure to provide proof of the defendant's prior convictions during the sentencing phase required reversal of the court's finding that the defendant was a habitual offender. *Mackey v. State*, 56 Ark. App. 164, 939 S.W.2d 851 (1997), reversed on other grounds by 329 Ark. 229, 947 S.W.2d 359 (1997).

Although the docket sheet did not reflect an entry of judgment, there was no error in allowing the admission of a certified copy of the trial court's docket notations reflecting a suspended sentence to help prove a prior conviction of a felony. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

Propriety of Sentence.

Defendant's sentence was not illegal on its face; although she was given a sentence greater than the presumed one, her sentence was authorized pursuant to this section, which governs sentencing for habitual offenders. *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

Representation by Counsel.

A prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or he validly waived counsel. *Mangiapane v. State*, 46 Ark. App. 64, 876 S.W.2d 610 (1994).

Where the docket sheet in question included an express notation from which it could reasonably be inferred that counsel was appointed to represent defendant,

and that that representation continued throughout the course of the proceedings since there was no entry showing that counsel had been dismissed, defendant's enhanced sentence was approved. *Mangiapane v. State*, 46 Ark. App. 64, 876 S.W.2d 610 (1994).

A prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or validly waived counsel. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

Where the state had supplied the defendant with a "pen pack" for each prior conviction which did not reflect the defendant had an attorney in each case, but the docket entries showing representation were not supplied to defense counsel prior to the sentencing phase of trial, defendant's objection was meritless since the defense had been put on notice the state was going to ask for sentence enhancement because of the prior convictions and should have anticipated the pen pack's deficiency regarding prior representation being corrected. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

A conviction cannot be used to enhance punishment under the recidivist statutes unless the records of prior convictions show that the defendant was represented by counsel or waived counsel. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

Handwritten notations on the docket sheet, stating that defendant had waived his right to counsel, were sufficient to allow the conviction to be used for enhancement purposes. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

Retrial.

Defendant could be tried as an habitual offender on retrial, even though his habitual offender status was not prosecuted in the first trial; raising the defendant's habitual offender status at the second trial did not constitute prosecutorial vindictiveness. *Gardner v. State*, 332 Ark. 33, 963 S.W.2d 590 (1998).

Role of Jury or Judge.

The judge and not the jury should determine whether a defendant is an habitual offender. *Lovelace v. Lockhart*, 765 F.2d 742 (8th Cir.), cert. denied, 474 U.S. 1010, 106 S. Ct. 538, 88 L. Ed. 2d 469 (1985).

Sentences.

Sentence imposed was consistent with the language of this section. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

Where sentence was erroneously enhanced on basis of prior conviction, such error did not mandate a new trial since Supreme Court could reduce the sentence in lieu of reversing and remanding for a new trial. *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891 (1980).

Where defendant successfully challenged the use of foreign convictions in enhancing his sentence, but never challenged Arkansas felony convictions introduced in evidence, and where, under the law in force at the time of his conviction, the minimum punishments under the recidivist statutes would have been imprisonment for 21 years and the circuit judge could have made the sentences for the two offenses run concurrently in order to make certain that defendant had not suffered any prejudice, his sentence would be reduced to 21 years. *Klimas v. State*, 271 Ark. 508, 609 S.W.2d 46 (1980).

Although the evidence was insufficient to support the finding that the defendant in a burglary prosecution had violated § 5-4-505 (repealed), resentencing the defendant was unnecessary where the sentence that the defendant had received was the minimum sentence he could have received under this section as an extended term of punishment. *Jordon v. State*, 274 Ark. 572, 626 S.W.2d 947 (1982).

Sentence of term of imprisonment and fine was within the range of sentences for a defendant convicted of a class B felony who had eight previous felony convictions. *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982).

The use of the word "may" in § 5-4-401 and this section does not mean that, in all habitual offender cases, the provisions of both sections are available and that the court is required to choose from those two statutes; the sentences for habitual offenders are governed by this section and the minimum sentences for habitual offenders are different than for persons who have not been convicted of two or more felonies. *Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983).

Defendant charged with delivery of a controlled substance under § 5-64-401(a)(1)(i) and as an habitual offender under this section was subject to the

range of sentences for class Y felonies under this section. *Williams v. State*, 292 Ark. 616, 732 S.W.2d 135 (1987).

Trial court did not err in allowing prior felony convictions into evidence in sentencing phase of trial. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987).

There is no provision under Arkansas law or the United States Constitution which prohibits a sentence of a term of years which exceeds usual life span of human beings. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987); *Luckey v. State*, 302 Ark. 116, 787 S.W.2d 244 (1990); *Franklin v. State*, 308 Ark. 539, 825 S.W.2d 263 (1992).

Sentence of "more than life" would be life without possibility of parole or death, the only penalties more severe than life in prison. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987).

Defendant who was convicted of aggravated robbery and as an habitual offender was properly sentenced to 40 years imprisonment under subdivision (b)(1), since aggravated robbery is a Class Y felony and those provisions of § 5-12-103(c) (repealed) which contained enhancement provisions were repealed by Acts 1981, No. 620, § 13. *Tippitt v. State*, 294 Ark. 342, 742 S.W.2d 931 (1988).

The word "may" in this section does not mean the jury is permitted, but not required, to sentence defendant to twenty to forty years but that the jury may sentence the offender to any term of years between twenty and forty. *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990).

The court reduced the sentence for possession with intent to deliver cocaine from a term of sixty years to fifty years, the maximum term of years under subdivision (a)(7) of this section, in accordance with § 16-91-113(c)(3). *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

A sentence of 300 years did not exceed life imprisonment since the only sentences greater than life would be life without parole and death. *Franklin v. State*, 308 Ark. 539, 825 S.W.2d 263 (1992).

Imposition of life sentence was proper where defendant was convicted of rape, a class Y felony, and with a record of four prior felonies, the range of his punishment was forty years to life imprisonment. *Henderson v. State*, 310 Ark. 287, 835 S.W.2d 865 (1992).

Sentence of "more than life" is defined

as life without parole or death; therefore, two sentences of one hundred years each for two aggravated robbery convictions were within the statutory limits of subdivision (b)(1) and thus were not facially illegal. *Claiborne v. State*, 319 Ark. 537, 893 S.W.2d 324 (1995).

The court erred in reducing defendant's jury sentence from thirty to fifteen years where the jury's sentence was within the range of permissible sentences under this section. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997), supplemental op., reh'g denied, 328 Ark. App. 116 (1997).

There was no double jeopardy violation where defendant was sentenced for violating both subdivision (a)(1)(i) of this section (possession with intent to deliver a controlled substance) and § 5-74-106 (simultaneous possession of drugs and firearms); the legislature made it clear that it wished to assess an additional penalty for simultaneously possessing drugs and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Sentencing defendant under the specific provisions of § 5-26-305(b), which enhanced the offense to a Class D felony, and to also sentence him under this section, the general habitual offender statute, was impermissible and resulted in an illegal sentence of twelve years imprisonment that had to be corrected. *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003).

Trial court did not err in sentencing defendant, who was convicted of two counts of committing a terroristic act, to 30 years' imprisonment pursuant to the "three strikes" provision of subdivision (d)(1) of this section based on the fact that he had been convicted the previous month of three counts of aggravated robbery in an unrelated case. *Benson v. State*, 86 Ark. App. 154, 164 S.W.3d 495 (2004).

Waiver.

Where a defendant sentenced as an habitual offender objected to his sentence based upon the fact that no showing was made that he was represented by counsel in the underlying misdemeanor convictions used to advance the conviction to a felony, failed to adduce proof at trial to show lack of representation and also did not raise the issue, any procedural error upon which reversal might be based was waived by his failure to assert it. *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985).

Where defendant argued in the trial court that his two prior convictions for rape and kidnapping should count as one offense because they occurred on the same date, defendant waived his right to raise the new claim on appeal that the two offenses should count as one because the state had not shown that the force used to commit the kidnapping did not exceed that needed to commit the rape; however, the trial court erred in sentencing defendant to life without parole because defendant was eligible for parole under § 16-93-1302. *Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002).

Cited: *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977); *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977); *Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978); *Brown v. State*, 264 Ark. 248, 570 S.W.2d 251 (1978); *Taylor v. Mabry*, 593 F.2d 318 (8th Cir. 1979); *Cox v. Hutto*, 476 F. Supp. 906 (E.D. Ark. 1979); *Hixson v. State*, 266 Ark. 778, 587 S.W.2d 70 (1979); *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980); *Thorne v. State*, 269 Ark. 556, 601 S.W.2d 886 (1980); *Jones v. State*, 270 Ark. 328, 605 S.W.2d 7 (1980); *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980); *Shelton v. State*, 271 Ark. 342, 609 S.W.2d 18 (1980); *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981); *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, cert. denied, 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2d 89 (1981); *Loane v. State*, 271 Ark. 797, 611 S.W.2d 190 (1981); *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981); *Thorne v. State*, 274 Ark. 102, 622 S.W.2d 178 (1981); *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981); *Thomas v. State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981); *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982); *Griffin v. State*, 276 Ark. 266, 633 S.W.2d 708 (1982); *Gilbert v. State*, 277 Ark. 61, 639 S.W.2d 346 (1982); *Harris v. State*, 6 Ark. App. 89, 638 S.W.2d 698 (1982); *Stocker v. State*, 280 Ark. 450, 658 S.W.2d

879 (1983); *Johnson v. Lockhart*, 746 F.2d 1367 (8th Cir. 1984); *Glenn v. State*, 281 Ark. 454, 664 S.W.2d 868 (1984); *Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984); *McDonald v. State*, 284 Ark. 201, 680 S.W.2d 703 (1984); *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *Mitchell v. State*, 12 Ark. App. 263, 675 S.W.2d 373 (1984); *Clinkscale v. State*, 13 Ark. App. 149, 680 S.W.2d 728 (1984); *Lawrence v. Lockhart*, 767 F.2d 449 (8th Cir. 1985); *Schwindling v. Smith*, 777 F.2d 431 (8th Cir. 1985); *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985); *Neely v. State*, 18 Ark. App. 122, 711 S.W.2d 482 (1986); *Murdock v. State*, 18 Ark. App. 228, 712 S.W.2d 321 (1986); *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986); *Denton v. State*, 290 Ark. 24, 716 S.W.2d 198 (1986); *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986); *Leggins v. Lockhart*, 649 F. Supp. 894 (E.D. Ark. 1986); *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987); *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987); *Williams v. State*, 22 Ark. App. 253, 739 S.W.2d 174 (1987); *Smith v. Lockhart*, 882 F.2d 331 (8th Cir. 1989); *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989); *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990); *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990); *Johnson v. Lockhart*, 921 F.2d 796 (8th Cir. 1990); *Gomez v. State*, 305 Ark. 496, 809 S.W.2d 809 (1991); *Evans v. State*, 310 Ark. 397, 836 S.W.2d 384 (1992); *Talley v. State*, 312 Ark. 271, 849 S.W.2d 493 (1993); *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993); *Terry v. Endell*, 32 F.3d 325 (8th Cir. 1994); *Bray v. State*, 322 Ark. 178, 908 S.W.2d 88 (1995); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Wright v. State*, 327 Ark. 455, 939 S.W.2d 835 (1997); *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999); *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001); *McCrary v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 24 (Jan. 12, 2005).

5-4-502. Habitual offenders — Sentencing procedure.

The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to § 5-4-501:

(1) The jury shall first hear all evidence relevant to the felony with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(2)(A) If the defendant is found guilty of the felony, out of the hearing of the jury the trial court shall hear evidence of the defendant's prior felony convictions or prior findings of the defendant's guilt of felonies and shall determine the number of prior felony convictions, if any.

(B) The defendant shall have the right to hear and controvert evidence described in subdivision (2)(A) of this section and to offer evidence in his or her support;

(3)(A) The trial court shall then instruct the jury as to the number of prior felony convictions and the statutory sentencing range.

(B) The jury may be advised as to the nature of a prior felony conviction and the date and place of a prior felony conviction; and

(4) The jury shall retire again and then determine a sentence within the statutory range.

History. Acts 1975, No. 280, § 1005; 1977, No. 474, § 7; 1981, No. 252, § 3; A.S.A. 1947, § 41-1005.

CASE NOTES

ANALYSIS

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Evidence.

Guilty pleas.

Proof.

Role of jury.

Stipulations.

Constitutionality.

This section is not unconstitutional under Ark. Const., Art. 7, § 23, since the number of prior felony convictions of the defendant is a matter of law and not a question of fact. *Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984).

Construction.

Section 16-90-205 and this section both address the bifurcated procedure for trials involving habitual criminals; Title 16 addresses judgment and sentencing generally, and this title addresses disposition of offenders. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

Although § 16-90-205 contains a provision which states "nothing in this subdivision shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his

own defense," this section does not contain a corresponding provision. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

Purpose.

The habitual criminal statute was not designed to act as a deterrent but as a punitive statute that provides, in an appropriate case, that a prior conviction, regardless of the date of the crime, may be used to increase punishment. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

Applicability.

This section is inapplicable to the Omnibus Driving While Intoxicated Act. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

This section is not inapplicable in bench trials even though it refers only to a jury. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Bifurcated Trial.

The trial of an habitual offender is bifurcated only to protect the defendant by withholding proof of his earlier convictions until the jury has found him guilty, and the sole purpose of the second stage is to allow the jury to consider possible enhancement of the sentence, not its reduction. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981) (decision prior to 1981 amendment).

Purpose of bifurcated process is to pro-

tect defendant by withholding proof of his prior convictions until jury has found him guilty. Bifurcated procedure should be followed in cases where it applies, even where prior convictions are an element of offense charged; however, this protection must be balanced with state's entitlement to prove all elements of an offense. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

The General Assembly intended for the procedure in this section to apply in jury trials and, in doing so, to provide for bifurcated trials to protect the defendant by withholding proof of his earlier convictions until the jury has found him guilty. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

The bifurcated procedures outlined in §§ 16-97-101 — 16-97-104 are applicable to cases involving an alleged habitual offender; it was not error under this section to allow testimony and argument during the sentencing phase. *Daniels v. State*, 322 Ark. 367, 908 S.W.2d 638 (1995).

Compliance.

Where certified copies of judgments showing that defendant had pled guilty to prior offenses were placed in the record, there was, if not a literal compliance with the requirements of subdivision (2), certainly a substantial compliance. *Jones v. State*, 283 Ark. 308, 675 S.W.2d 825 (1984).

The correct statutory procedure in a bifurcated trial is, after a finding of guilt, for the trial court to hold a hearing, out of the presence of the jury, to determine the number of prior convictions and then to instruct the jury as to the number to be considered by them in fixing the punishment. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

Defendant's Evidence.

There is no indication in this section of a legislative intention to permit a habitual offender to introduce any evidence during the second stage of the trial except proof to rebut the evidence of previous convictions. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981) (decision prior to 1981 amendment).

Where the prosecution presented certified copies of prior foreign felony convictions, the defendant was not entitled to present testimony that he was actually

innocent of the crimes and had pleaded guilty on the advice of counsel since this section does not give a defendant the right to argue his innocence at a later date when he has conceded that he pleaded guilty to each of the prior felonies. *Harris v. State*, 273 Ark. 355, 620 S.W.2d 289 (1981) (decision prior to 1981 amendment).

Failure of trial court to allow defendant to present claim that he pled guilty to prior felonies on advice of counsel but that he was actually innocent of the charges was not a violation of U.S. Const., Amend. 6 since a claim of innocence of the crimes charged alone does nothing to detract from the validity of a guilty plea. *Harris v. Lockhart*, 743 F.2d 619 (8th Cir. 1984).

Although the trial court commented to the jury that the defendant's prior convictions in another state rendered the defendant infamous, which was further evidence the jury could consider in determining whether the prior convictions were felonies, the comment was not cause for reversal. First, the defendant had no right to have a jury decide the issue; therefore, the defendant could not show any prejudice by the comment to the jury. Second, the issue of the number of prior convictions is a matter of law, not fact; thus, the prohibition against commenting on a factual issue, in Ark. Const., Art. 7, § 23, did not apply. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

It is not mandatory that the jury know the nature, time, and place of the previous felonies; that is a matter of discretion with the trial court. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

The trial court is under no duty to sua sponte inform the jury of the nature of the previous convictions and the dates and places thereof in the absence of a request for such information by the parties or the jury. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

The purpose of the procedure set forth in subdivision (2) of this section was to enable the court to determine the number of prior convictions the jury might consider in the sentencing phase, the section does not provide that the hearing be held before the jury. It provides exactly the opposite. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Evidence.

Both § 16-90-205 and this section pro-

vide that evidence of prior convictions shall not be considered until after the defendant is found guilty. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

The introduction of a prior criminal conviction is not forbidden during the guilt/innocence phase of a bifurcated trial. *Thomas v. State*, 315 Ark. 518, 868 S.W.2d 85 (1994).

Guilty Pleas.

Each plea of guilty to each offense is considered as a separate and previous conviction, even though concurrent sentences are imposed, under the habitual offender statutes; a defendant's claim of innocence with respect to some of the established prior convictions is irrelevant. *Gilbert v. State*, 277 Ark. 61, 639 S.W.2d 346 (1982).

Proof.

Even though the defendant may controvert evidence of his previous felony convictions and offer evidence to rebut the state's evidence, the burden remains on the state to prove such connections beyond a reasonable doubt. *Leggins v. State*, 267 Ark. 293, 590 S.W.2d 22 (1979).

A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

The trial court erred in allowing the jury to take copies of defendant's prior convictions into the deliberation room because such material is not introduced into evidence to be considered by the jury. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

Trial court permitted improper introduction of evidence of prior convictions. *Costillo v. State*, 292 Ark. 43, 728 S.W.2d 153 (1987), overruled on other grounds by *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996).

For purposes of sentence enhancement, prior convictions are proven by judgments during the punishment phase of the trial. *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988).

Role of Jury.

Stipulations.

Stipulation as to the existence of prior convictions did not deprive defendant of due process of law nor was his right to have the state prove the prior offenses and his right to rebut that proof waived. *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, cert. denied, 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2d 89 (1981).

Cited: *Klimas v. Mabry*, 599 F.2d 842 (8th Cir. 1979); *Duncan v. State*, 267 Ark. 41, 588 S.W.2d 432 (1979); *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980); *Lingo v. State*, 271 Ark. 776, 610 S.W.2d 580 (1981); *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982); *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982); *Hunter v. State*, 280 Ark. 307, 657 S.W.2d 543 (1983); *Taylor v. State*, 9 Ark. App. 286, 658 S.W.2d 432 (1983); *Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984); *Beavers v. Lockhart*, 755 F.2d 657 (8th Cir. 1985); *Nelson v. Lockhart*, 641 F. Supp. 174 (E.D. Ark. 1986); *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987); *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987); *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988); *Prichard v. State*, 300 Ark. 10, 775 S.W.2d 898 (1989); *Jones v. Arkansas*, 929 F.2d 375 (8th Cir. 1991); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991); *Lewis v. State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993); *Benton v. State*, 41 Ark. App. 167, 850 S.W.2d 36 (1993); *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996); *Lockhart v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 707 (Nov. 10, 2005).

5-4-503. Habitual offenders — Previous conviction in another jurisdiction.

For purposes of § 5-4-501, a conviction or finding of guilt of an offense in another jurisdiction constitutes a previous conviction or finding of guilt of a felony if a sentence of death or of imprisonment for a term in excess of one (1) year was authorized under a law of the other jurisdiction.

History. Acts 1975, No. 280, § 1002; 1977, No. 474, § 5; A.S.A. 1947, § 41-1002.

RESEARCH REFERENCES

Ark. L. Rev. Conflict of Laws: Arkansas, 32 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Conviction.

Felonies.

Supersession.

Conviction.

Evidence of defendant's prior Oklahoma deferred sentence and plea of nolo contendere to the offense of rape in the first degree held admissible for sentencing purposes. *McClish v. State*, 331 Ark. 295, 962 S.W.2d 332 (1998).

Felonies.

Where the defendant's prior convictions in another state carried sentences in excess of one year, all of the convictions would be considered felonies for the purpose of applying the habitual offender

statute. *Knight v. State*, 277 Ark. 213, 640 S.W.2d 442 (1982).

Where the defendant had three prior convictions in another state and all three convictions were punishable by imprisonment of a term in excess of one year, the evidence was sufficient to support the extended term under § 5-4-501, the habitual offender statute. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

Supersession.

Section 16-90-203, governing the effect of conviction in another state, was superseded by this section. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

Cited: *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980); *Lincoln v. State*, 287 Ark. 16, 696 S.W.2d 316 (1985); *Cherry v. State*, 302 Ark. 462, 791 S.W.2d 354 (1990).

5-4-504. Habitual offenders — Proof of previous conviction.

(a) A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty.

(b) Any of the following are sufficient to support a finding of a prior conviction or finding of guilt:

(1) A certified copy of the record of a previous conviction or finding of guilt by a court of record;

(2) A certificate of the warden or other chief officer of a correctional institution of this state or of another jurisdiction, containing the name and fingerprints of the defendant as the name and fingerprints appear in the records of the warden's or other chief officer's office; or

(3) A certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as the name and fingerprints appear in the records of the chief custodian's office.

History. Acts 1975, No. 280, § 1003; 1977, No. 474, § 6; 1981, No. 252, § 1; A.S.A. 1947, § 41-1003.

CASE NOTES

ANALYSIS

Certified copy.
Convictions.
Evidence.
Instructions.
Juvenile delinquency adjudication.
Proof.
Question of fact.
Right of confrontation.
Scope of review.

Certified Copy.

Where the docket book was the original, not a copy, there was no reason whatever to certify or authenticate that it was an exact copy. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994).

Circuit Clerk's certification of a copy of a previous conviction record as a true copy, rather than a true and correct copy, was sufficient to satisfy subdivision (b)(1) of this section. *Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

Convictions.

Prior convictions on appeal may be used for sentence enhancement. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987).

Unless the records of prior convictions show that the defendant was represented by counsel, there is a presumption that the defendant was denied assistance of counsel, and the convictions cannot be used to enhance punishment under the habitual offender provisions. *Stewart v. State*, 300 Ark. 147, 777 S.W.2d 844 (1989).

Evidence.

Proof of defendant's previous convictions was not inadmissible as hearsay where circuit clerk's testimony about them was based upon docket entries and there was no suggestion that the docket entries did not correctly reflect the court's judgments. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, cert. denied, 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978).

Where the state introduced prior convictions, under different names which could not be said to sound identical, the jury's finding that the defendant was the same person as that in the previous convictions was not supported by substantial evidence. *Leggins v. State*, 267 Ark. 293, 590 S.W.2d 22 (1979).

Even though one of the certified copies of the previous judgments against the defendant reflected a different last name from that of the defendant, there was still substantial evidence to support the jury's finding that the defendant had suffered that conviction. *Elmore v. State*, 268 Ark. 225, 595 S.W.2d 218 (1980).

The similarity in sound between a name the defendant had signed on an affidavit and one appearing on a prior conviction connected defendant with the prior conviction. *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980).

Where the proof of prior conditions consisted of copies of orders of commitment from a court of competent jurisdiction, duly certified under seal, there was substantial evidence by which the jury could find the prior convictions proved as required by this section. *Thomas v. State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981).

Evidence held sufficient for the jury to enhance the defendant's sentence. *Guzman v. State*, 3 Ark. App. 240, 625 S.W.2d 540 (1981); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

There was sufficient prima facie proof of defendant's previous convictions. *Kaestel v. State*, 274 Ark. 550, 626 S.W.2d 940 (1982).

Evidence of prior felony convictions held admissible. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987).

There was substantial evidence to support finding that appellant had been previously convicted of four felonies. *Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990).

Although the docket sheet did not reflect an entry of judgment, there was no error in allowing the admission of a certified copy of the trial court's docket notations reflecting a suspended sentence to help prove a prior conviction of a felony. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

Instructions.

Where the proof of previous convictions was undisputed, the judge was permitted to instruct the jury that the defendant had a certain number of previous convictions. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

Juvenile Delinquency Adjudication.

A prior juvenile delinquency adjudication cannot be used for sentence enhancement under the habitual offender law. *Vanesch v. State*, 343 Ark. 381, 37 S.W.3d 196 (2001).

Proof.

The burden of proof is on the state to prove the defendant's prior convictions for the purpose of sentencing under the habitual offender statute; the state, however, is not limited to the methods of proof set forth in the statute. *Elmore v. State*, 268 Ark. 225, 595 S.W.2d 218 (1980); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

The state is not limited to the modes of proof of prior convictions listed specifically in this section but can rely on any evidence that satisfied the appropriate burden of proof. *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982).

A previous conviction, or finding of guilt, of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. *Pacee v. State*, 306 Ark. 563, 816 S.W.2d 856 (1991).

Where there was no suggestion whatever that the proof presented did not correctly reflect the judgments in the earlier cases in which defendant was convicted, the state sufficiently proved the three prior convictions. *Daniels v. State*, 322 Ark. 367, 908 S.W.2d 638 (1995).

Question of Fact.

The question of whether photographs and certified records actually established beyond a reasonable doubt that the defendant was the person who had been con-

victed of the previous offenses is for the trier of fact to decide. *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982).

Right of Confrontation.

The introduction of a copy of the defendant's record of prior convictions, which was certified by the custodian of the records, did not violate the defendant's right of confrontation. *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982).

Scope of Review.

On an appeal, the test is whether there is substantial evidence from which the jury could have found that the defendant was previously convicted of the questioned felony. *Elmore v. State*, 268 Ark. 225, 595 S.W.2d 218 (1980); *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

Cited: *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980); *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981); *Guzman v. State*, 3 Ark. App. 240, 625 S.W.2d 540 (1981); *Gilbert v. State*, 277 Ark. 61, 639 S.W.2d 346 (1982); *Glenn v. State*, 281 Ark. 454, 664 S.W.2d 868 (1984); *Jones v. State*, 283 Ark. 308, 675 S.W.2d 825 (1984); *Beavers v. Lockhart*, 755 F.2d 657 (8th Cir. 1985); *Lincoln v. State*, 287 Ark. 16, 696 S.W.2d 316 (1985); *Nelson v. Lockhart*, 641 F. Supp. 174 (E.D. Ark. 1986); *Leggins v. Lockhart*, 649 F. Supp. 894 (E.D. Ark. 1986); *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987); *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988); *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990); *Jones v. Arkansas*, 929 F.2d 375 (8th Cir. 1991); *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996); *King v. State*, 62 Ark. App. 112, 969 S.W.2d 199 (1998).

5-4-505, 5-4-506. [Repealed.]

Publisher's Notes. These sections, concerning sentence enhancement for use of a firearm and for physical injury to older persons, were repealed by identical Acts 1993, Nos. 532 and 550. The sections were derived from the following sources:

§ 5-4-505. Acts 1975, No. 280, § 1004; 1981, No. 252, § 2; A.S.A. 1947, § 41-1004.

§ 5-4-506. Acts 1987, No. 160, § 1.

SUBCHAPTER 6 — TRIAL AND SENTENCE — CAPITAL MURDER

SECTION.

- 5-4-601. Legislative intent.
- 5-4-602. Capital murder charge — Trial procedure.
- 5-4-603. Findings required for death sentence — Harmless error review.
- 5-4-604. Aggravating circumstances.
- 5-4-605. Mitigating circumstances.
- 5-4-606. Life imprisonment without parole.
- 5-4-607. Application for executive clemency — Regulations.

SECTION.

- 5-4-608. Waiver of death penalty.
- 5-4-609 — 5-4-614. [Reserved.]
- 5-4-615. Conviction — Punishments.
- 5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.
- 5-4-617. Method of execution.
- 5-4-618. Mental retardation.

A.C.R.C. Notes. References to “this subchapter” in §§ 5-4-601 — 5-4-617 may not apply to § 5-4-618 which was enacted subsequently.

References to “this chapter” in subchapters 1-5 and §§ 5-4-601 — 5-4-617 may not apply to § 5-4-618 which was enacted subsequently.

Publisher’s Notes. Acts 1975, No. 280, § 1309, provided that if any provision of §§ 5-4-601 — 5-4-608 or the application thereof to any person or circumstance was held invalid that the invalidity was not to affect other provisions or applications of §§ 5-4-601 — 5-4-608 that could be given effect without the invalid provision or application, and to that end the provisions of §§ 5-4-601 — 5-4-608 were declared to be severable.

For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Costs and fees — Capital cases, § 16-92-104.

Execution of Sentence — Death Penalty, § 16-90-501 et seq.

Post-conviction, § 16-91-201 et seq.

Effective Dates. Acts 1983, No. 546, § 3: Mar. 19, 1983. Emergency clause provided: “It is hereby found and determined that those defendants whose death sentences have been vacated by the appellate courts, with their convictions upheld, have been sentenced to life without parole; because of the provision requiring sentencing by the same jury that determines guilt, the State must either accept the reduced sentence, or, if it wishes to reimpose the death penalty, to retry both the guilt and sentencing phases; it is a waste of judicial resources to require the

retrying of an error-free trial if the State wishes to seek to reimpose the death penalty; and this Act is immediately necessary to rectify that problem. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1985, No. 833, § 2: Apr. 4, 1985. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present statute governing aggravating circumstances which justify the imposition of the death penalty does not adequately provide for appropriate punishment when the crime of capital murder is committed in an especially heinous, atrocious or cruel manner of committing a capital felony murder is an appropriate consideration in determining the penalty for such a crime; and that the addition of this aggravating circumstance to the statutorily authorized list of aggravating circumstances is immediately necessary to provide for its consideration in trials for capital murders which may occur after the passage and approval of this Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1089, § 6: Apr. 13, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that it is necessary to authorize the admission of victim impact evidence at

the penalty phase of capital murder trials and that immediate passage of this act is necessary to protect the public peace, health and safety of the state of Arkansas. Therefore, an emergency is hereby de-

clared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR 4th 1028.

Am. Jur. 21A Am. Jur. 2d, Crim. L., §§ 950-975.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

Note, Grigsby v. Mabry: Convictions Rendered by Death-Qualified Juries Are Unconstitutional, 39 Ark. L. Rev. 335.

Lushing, Capital Punishment: A Disputation, 42 Ark. L. Rev. 105.

C.J.S. 24 C.J.S., Crim L., § 1529 et seq.

UALR L.J. Note, Criminal Procedure — Waiver of Appellate Review of Death Sentences in Arkansas; Standing — Capacity to Litigate Matters of Public Interest in Arkansas, Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988), 11 UALR L.J. 569.

CASE NOTES

Constitutionality.

The Arkansas capital punishment procedure under § 5-10-101 and this subchapter appropriately narrows the class of death eligible persons and is constitu-

tional. Perry v. Lockhart, 871 F.2d 1384 (8th Cir. 1989), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Cited: Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988).

5-4-601. Legislative intent.

(a) In enacting this subchapter, it is the intent of the General Assembly to specify the procedures and standards pursuant to which a sentencing body shall conform in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder.

(b) If the provisions of this subchapter respecting sentencing procedures are held invalid with regard to the imposition of a sentence of death or a sentence of death is declared to be invalid per se, it is the intent of the General Assembly that:

(1) Capital murder is punishable by life imprisonment without parole; and

(2) The procedures and findings required by §§ 5-4-602 — 5-4-605, 5-4-607, and 5-4-608 are deemed repealed and of no effect.

History. Acts 1975, No. 280, § 1308; A.S.A. 1947, § 41-1308.

CASE NOTES

Cited: Singleton v. Lockhart, 653 F. Supp. 1114 (E.D. Ark. 1986); Wilson v. State, 295 Ark. 682, 751 S.W.2d 734

(1988); Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996); Camargo v. State, 327 Ark. 631, 940 S.W.2d 464 (1997).

5-4-602. Capital murder charge — Trial procedure.

The following procedures govern a trial of a person charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge and shall then retire to reach a verdict of guilt or innocence;

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, the sentence shall be determined and imposed as provided by law;

(3)(A) If the defendant is found guilty of capital murder, the same jury shall sit again in order to:

(i) Hear additional evidence as provided by subdivisions (4) and (5) of this section; and

(ii) Determine the sentence in the manner provided by § 5-4-603.

(B) However, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, then:

(i) No hearing under subdivision (3)(A) of this section is required; and

(ii) The trial court shall sentence the defendant to life imprisonment without parole;

(4)(A) If the defendant and the state are accorded an opportunity to rebut the evidence, in determining the sentence evidence may be presented to the jury as to any:

(i) Matter relating to an aggravating circumstance enumerated in § 5-4-604;

(ii) Mitigating circumstance; or

(iii) Other matter relevant to punishment, including, but not limited to, victim impact evidence.

(B)(i) Evidence as to any mitigating circumstance may be presented by either the state or the defendant regardless of the evidence's admissibility under the rules governing admission of evidence in a trial of a criminal matter.

(ii) However, mitigating circumstance evidence shall be relevant to the issue of punishment, including, but not limited to, the nature and circumstances of the crime, and the defendant's character, background, history, and mental and physical condition as set forth in § 5-4-605.

(C) The admissibility of evidence relevant to an aggravating circumstance set forth in § 5-4-604 is governed by the rules governing the admission of evidence in a trial of a criminal matter.

(D) Any evidence admitted at the trial relevant to punishment may be considered by the jury without the necessity of reintroducing the evidence at the sentencing proceeding; and

(5) The state and the defendant or his or her counsel are permitted to present argument respecting sentencing:

(A) The state shall open the argument;

(B) The defendant is permitted to reply; and

(C) The state is then permitted to reply in rebuttal.

History. Acts 1975, No. 280, § 1301; A.S.A. 1947, § 41-1301; Acts 1993, No. 1089, § 1.

Publisher's Notes. Acts 1993, No. 1089, § 2, provided: "It is the express intention of this act to permit the prose-

cution to introduce victim impact evidence as permitted by the United States Supreme Court in *Payne v. Tennessee*, 111 S.Ct. 2597, 115 L.Ed.2d 720, [reh'g denied, 112 S.Ct. 28, 115 L.Ed.2d 1110] (1991)."

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Constitutional Law, 1 UALR L.J. 140.

Survey of Arkansas Law, Criminal Procedure, 5 UALR L.J. 123.

CASE NOTES

ANALYSIS

Constitutionality.

Appeal.

Cruel and unusual punishment.

Death penalty.

Defendant's rights.

Effect of amendments.

Evidence.

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Joint sentencing.

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Victim impact evidence.

—Constitutionality.

—In general.

—Relevance.

Voir dire.

Waiver.

Constitutionality.

Where defendant was sentenced to life imprisonment without parole, he could not attack as unconstitutionally vague provisions of former similar statute which would have permitted the jury to impose the death penalty after assessing aggravating circumstances, since defendant had not been penalized by that provision. *Williams v. State*, 260 Ark. 457, 541 S.W.2d 300 (1976) (decision under prior law).

Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury. *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

Allegation that the Arkansas death penalty statute impermissibly penalized peti-

tioner's exercise of his constitutional right to plead not guilty and to have a jury trial was rejected. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate this section and §§ 5-4-603 — 5-4-605. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

This section and § 5-10-101 et seq. are not unconstitutionally ambiguous, overbroad or vague, either facially or as applied. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Subdivision (4) of this section is not violative of due process; the impact of the murder on the victim's family is relevant to the jury's decision as to whether to recommend that the death sentenced be imposed. *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed. 2d 412 (1997).

Appeal.

In a capital felony case, it is the duty of the Supreme Court to examine the entire record, not only for those errors raised on appeal, but also for those that may be found in the record. *Bly v. State*, 263 Ark. 138, 562 S.W.2d 605 (1978).

Defendant who did not receive the death penalty lacked standing to point to errors having to do with the jury's consideration of the death penalty. *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *King v. State*, 312 Ark. 89, 847 S.W.2d 37 (1993).

Disguised evidentiary argument that

testimony should have been admitted under subdivision (4), which states that the rules of evidence, such as hearsay, do not apply to mitigating evidence in capital cases, was not entertained in Rule 37 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Where defendant moved for summary reversal of his conviction for capital murder based upon the omission of the original photo array from the record, but defendant had failed to object to the eyewitnesses' in-court identifications at trial, and because defendant's only point on appeal would have been procedurally barred, the appellate court held that the record on appeal was sufficient without the original photo array. *Lewis v. State*, 354 Ark. 359, 123 S.W.3d 891 (2003).

Cruel and Unusual Punishment.

Sentence of life imprisonment without parole was not cruel or unusual punishment, where the sentence was within the limits established by the legislature. *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976) (decision under prior law).

Where jury found defendant guilty of capital murder, the sentence it imposed of life imprisonment without parole was within the statutory limits of this section and thus not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Death Penalty.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977) (decision under prior law).

Argument that the death penalty was unconstitutional was rejected. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662

(1983), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Death sentence was not invalid because the trial court instructed the jury on pecuniary gain as an aggravating circumstance, and this aggravating circumstance did not violate U.S. Const. Amend. 8 by improperly duplicating an element of the robbery/murder offense with which he was convicted. Duplicative nature of Arkansas's statutory aggravating circumstance of pecuniary gain where the defendant is convicted of robbery/murder does not render the defendant's sentencing infirm, since the constitutionally-mandated-narrowing function was performed at the guilt phase. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Imposition of death penalty upheld. *Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993); *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), cert. denied, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

Both the capital murder conviction and the death penalty sentence held invalid and set aside. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

Defendant's Rights.

Although many capital defendants express a desire to give up if they are convicted, and an attorney should try to persuade the client to act in his best interests, this duty does not remove the ultimate decision of whether to present mitigating evidence from the client. *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

Effect of Amendments.

It appears that before 1993 Arkansas would not permit victim impact evidence or evidence of future dangerousness or evidence of any other aggravating circumstances not listed in § 5-4-604; however, the Arkansas Supreme Court has, albeit sub silentio, previously approved arguments concerning future dangerousness. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

In 1993, subdivision (4) of this section

was amended to allow the state to present additional evidence in aggravation beyond the enumerated statutory factors by providing for the introduction of "any other matter relevant to punishment", including, but not limited to, victim-impact evidence. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Evidence.

During the penalty stage of a capital murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975), *vacated insofar as judgment left undisturbed the death penalty imposed*, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976) (decision under prior law).

Even though this section tends to relax the requirement of admissibility with regard to authenticity or hearsay, the legislature did not intend to totally open the door to any and all matters simply because mitigation is the issue, so that testimony should be sworn and the state given an opportunity to cross-examine unless there are compelling and valid reasons for not doing so. *Hobbs v. State*, 273 Ark. 125, 617 S.W.2d 347 (1981).

The trial court did not err when, in the penalty phase of the capital murder trial, it refused to allow a defense witness to testify as to the defendant's charitable acts which the defendant had related to him, because the defendant was available to testify and there was no reason for the admission of such hearsay testimony. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

The trial court should exclude from the penalty phase of the trial the results of a polygraph examination given to the defendant; while the rules of evidence are not applicable to the penalty phase of the trial, the evidence offered must be probative of some issue to be properly considered in the penalty phase. *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

If either the trial court or a reviewing court finds that, after removal of any infirm factors, the residual evidence of-

ferred by the state at the initial proceeding will not support a death verdict, then the state has failed in its proof and may not try again. *Singleton v. Lockhart*, 653 F. Supp. 1114 (E.D. Ark. 1986), *aff'd in part, rev'd in part*, 871 F.2d 1395 (8th Cir.), *cert. denied*, 493 U.S. 874, 110 S. Ct. 207, 107 L. Ed. 2d 160 (1989).

Any relevant mitigating evidence concerning a defendant's character should not be excluded; such evidence may include defendant's behavior and conduct that existed not only before and at time of crime, but also that which occurred before sentencing and during the period of post-conviction relief, should a later resentencing occur. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, *cert. denied*, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Although subdivision (4) of this section provides that, in determining the sentence, evidence concerning mitigating circumstances may be presented regardless of the rules of evidence, but "evidence relevant to the aggravating circumstances . . . shall be governed by the rules governing the admission of evidence . . .," Evid. Rule 609 does not prevent the use of prior convictions if more than 10 years have elapsed since the date of the prior conviction. Evid. Rule 609 only prevents the use of prior convictions more than 10 years old for impeachment purposes; it is based upon the concept that a crime committed more than 10 years ago is no longer probative of a witness's truthfulness at the time of trial. On the other hand, the aggravating circumstances statute, § 5-4-604, is not concerned with the defendant's character at the time of trial; instead, this section is concerned with disclosing whether the defendant's history establishes such a propensity for violence that it will reoccur. Therefore, Evid. Rule 609 does not prevent the introduction of felony convictions more than 10 years old to show a propensity to violence in the penalty phase. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988).

Although subdivision (4) allows mitigating evidence to be presented regardless of its admissibility under the rules of evidence in criminal trials it does not open the way for irrelevant evidence. *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341, *cert. denied*, 497 U.S. 1011, 110 S. Ct. 3257, 111 L. Ed. 2d 766 (1990).

Under subdivision (4), a psychologist can use a patient's history to give the patient's prognosis. *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800, cert. denied, 505 U.S. 1225, 112 S. Ct. 3043, 120 L. Ed. 2d 911 (1992).

Evidence sufficient to find that petitioner made a knowing and intelligent waiver of his right to present evidence of mitigating circumstances during penalty phase. *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part and rev'd in part, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

The prosecutor's argument, along with the submission of the underlying nonviolent felonies to the jury for consideration during sentencing constituted constitutional error, which had a substantial and injurious effect or influence in the jury's determination that defendant should receive the death penalty. *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), aff'd in part, rev'd in part, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995).

In the penalty phase of a capital murder case, the defendant is not bound by the rules of evidence in showing mitigating circumstances, but the state is bound by the rules of evidence in proving aggravating circumstances under subdivision (4) of this section. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

By expanding the scope of permissible evidence during the penalty phase, the General Assembly has not expanded the scope of punishment or added a new aggravating circumstance; permitting testimony under Act 1993, No. 1089 did not constitute an ex post facto law. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Defendant's accomplice's testimony was corroborated and admissible, as other evidence independently established the accomplice's description of the double murder; the medical examiner's testimony, an officer's testimony, and testimony about defendant's van were all in accordance with the accomplice's testimony. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

Habeas Corpus Relief.

An evidentiary and procedural ruling based upon this section cannot be the

basis of habeas corpus relief unless it can be shown that the ruling violates a specific constitutional provision or that it is so prejudicial as to violate due process. *Pickens v. Lockhart*, 802 F. Supp. 208 (E.D. Ark. 1992), aff'd, 4 F.3d 1446 (8th Cir. 1993), cert. denied, 510 U.S. 1170, 114 S. Ct. 1206, 127 L. Ed. 2d 553 (1994).

Instructions.

Trial court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only the prior convictions involving threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Defendant's argument that, had the trial court instructed the jury on lesser-included offenses to terroristic threatening and aggravated assault, the jury might have found that he committed one or more misdemeanors, which would not have triggered the prior felony aggravating circumstances, held without merit; even if the jury had found the prior felony aggravating circumstance, it could only impose a sentence of death after considering (i) whether this aggravating circumstance justified a sentence of death, and (ii) whether this aggravating circumstance outweighed any mitigating circumstances found to exist. *Parker v. Norris*, 64 F.3d 1178 (8th Cir. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 820, 133 L. Ed. 2d 764 (1996).

Joint Sentencing.

A joint sentencing trial does not, per se, deprive any defendant of the right to individualized sentencing; where the evidence relating to the separate defendants is readily identifiable, and the jury is properly instructed, there is no problem. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Juries.

Insofar as the same jury is required to sit in both phases of a bifurcated trial, the idea that a juror who could qualify for only one phase of the trial can sit in both or that, on voir dire, the dual role of the jury

should be distinguished, is foreclosed. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

It is not impermissible for the same "death qualified" jury to both hear the evidence and determine the sentence in a bifurcated trial for capital murder. *Lasley v. State*, 274 Ark. 352, 625 S.W.2d 466 (1981).

The law of Arkansas permits prospective jurors to be challenged if they would automatically vote for the death penalty upon conviction regardless of the evidence. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd as modified, 758 F.2d 226 (8th Cir. 1985), rev'd on other grounds, *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The exclusion for cause of the veniremen with conscientious objections to the death penalty, without a determination that their objections would preclude their finding defendant guilty, did not deny him his right to an impartial jury and to a jury that was representative of the community. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

The death-qualification of the jury did not deprive defendant of an impartial jury. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983); *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

A death-qualified jury is constitutional. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

Exclusion for cause of two veniremen because of their uncertainty as to capital punishment, and failure to excuse for cause a venireman who showed a preference for it, did not constitute abuse of discretion. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Jurors who are unalterably opposed to

capital punishment should not be permitted to participate in the determination of guilt or innocence in capital cases and their exclusion is proper. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty does not violate a defendant's right under the Sixth and Fourteenth Amendments of the United States Constitution to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community or his constitutional right to an impartial jury. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty serves the state's entirely proper interest in obtaining a single jury that can impartially decide all of the issues in the defendant's case. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Since Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors; the trial court correctly decided that those excused jurors could not perform their duties, because they would not consider imposing a death sentence. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Life Sentence.

A sentence of "life in prison" or "straight life" is distinguishable from "life imprisonment without parole." The former sentence may be imposed for conviction on a Class Y felony, such as rape, but the latter sentence may be imposed only for conviction of capital murder. *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), cert. denied,

510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed. 2d 686 (1994).

Mitigating Circumstances.

Although the rules of evidence are not applicable to the admissibility of mitigating evidence, the statute does not open the way for the admission of irrelevant evidence; to be admissible, evidence of mitigating circumstances must be relevant to the issue of the defendant's punishment. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

The disposition of charges against the codefendant had nothing to do with the defendant's character, record, background, history, condition, or the circumstances of his crime; therefore, it was not relevant as a mitigating circumstance. *Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999).

It is not the case that any testimony a defendant believes would make the jury less likely to return a death verdict must be allowed to satisfy the dictates of federal due process; the broad range of facts admissible must focus on the persona of the defendant or on the fabric of the crime of which he has been convicted. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied, 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

Evidence of a murder victim's wife's forgiveness and her opinion that life imprisonment was the appropriate penalty did not constitute relevant mitigating evidence. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied, 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

Prior Convictions.

The admission of defendant's prior convictions at the penalty phase was erroneous and had a substantial and injurious effect or influence on the jury's determination that defendant should receive the death penalty. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), aff'd sub nom. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

To prove the defendant's prior commission of a violent felony that resulted in a conviction, the state may present any matters relating to the prior violent felony, including the circumstances surrounding the commission of the prior

crime. *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999).

Validity of Procedure.

A procedure for prosecuting those charged with capital felony murder in which the jury must make a unanimous determination of guilt of one of the narrowly defined categories of the crime beyond a reasonable doubt, and in which the same jury in the sentencing phase of the trial must hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances, provided adequate safeguards against arbitrary or capricious imposition of the death penalty. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 977, 98 S. Ct. 540, 54 L. Ed. 2d 471 (1977) (decision under prior law).

Victim Impact Evidence.

—Constitutionality.

Victim impact statute is not void for vagueness and not violative of Ark. Const., Art. 2, § 9. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 334 (1996).

Constitutionality of victim impact testimony upheld. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), cert. denied, 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1051 (1997).

The mere fact that the legislature has provided for the presentation of victim impact evidence does not mean that the victim impact evidence will be so unduly prejudicial as to render the trial fundamentally unfair and violate due process. *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), aff'd, 322 F.3d 500 (8th Cir. 2003).

Inmate who had been sentenced to death was incorrect in his argument that victim impact procedure was inadequate in not requiring the jury to find proof beyond a reasonable doubt as to victim statements; the court also specifically rejected the notion that victim-impact evidence is an aggravating circumstance or that it violates the statutory weighing process set out in §§ 5-4-603 through 5-4-605. *Johnson v. State*, 356 Ark. 534, 157

S.W.3d 151 (2004), cert. denied, — U.S. —, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

Arkansas's victim impact evidence statute, § 5-4-602(4), is procedural in nature and does not offend the Ex Post Facto Clause; the statute does not alter the potential penalty faced by any defendant, nor does it alter the state's burden of proof. *Nooner v. Norris*, 402 F.3d 801 (8th Cir. 2005).

—In General.

Subdivision (4) of this section clearly provides that evidence may be presented as to any matter relevant to punishment, including, but not limited to, victim-impact evidence; this section does not require that the evidence be limited to rebuttal. *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996), cert. denied, 519 U.S. 1125, 117 S. Ct. 979, 136 L. Ed. 2d 862 (1997).

The General Assembly clearly expressed the policy of this State that victim-impact evidence is relevant to the decision of what punishment is appropriate. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

The Victim Impact Statute, subdivision (4) of this section, which permits the presentation of victim impact evidence, does not improperly create a new aggravator outside the state statutory scheme of aggravators set forth in § 5-4-604. *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), *aff'd*, 322 F.3d 500 (8th Cir. 2003).

—Relevance.

Victim-impact evidence is not an additional aggravating circumstance but rather is relevant evidence which informs the jury of the toll the murder has taken on the victim's family; such evidence has been sanctioned by the U.S. Supreme Court as relevant, although as a safeguard against excessive victim-impact evidence, the Due Process Clause provides a mechanism for relief when such evidence is so unduly prejudicial that it renders the trial fundamentally unfair. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

Penalty recommendations from family members of the victim are not relevant as victim-impact evidence. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied, 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

Where the prisoner failed to show how

the victim impact evidence admitted during the sentencing phase of his capital murder trial differed from that deemed admissible in prior U.S. Supreme Court cases or how it unduly prejudiced him, he was unable to establish that subdivision (4) of this section was void for vagueness; the prisoner's Eighth Amendment and due process challenges to the statute likewise failed. *Nooner v. Norris*, 402 F.3d 801 (8th Cir. 2005).

Voir Dire.

Defendants in a capital murder case are not permitted to voir dire the jury between the guilt phase and the penalty phase of the trial since subdivision (3) requires the same jury sit at both phases. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

Waiver.

Defendant validly waived his right to present mitigating evidence where he had for months steadfastly refused to present mitigating evidence because he wanted to spare his family and friends from the trauma of such proceedings, the issue was discussed every time his attorneys met with defendant, and furthermore, because defendant had gone through a previous capital murder trial where he did present mitigating evidence, he certainly understood both the purpose of such evidence and the effect which it would have on those testifying; consequently, he made an informed and voluntary choice. *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

Cited: *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981); *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982); *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734 (1988); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989); *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991); *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998); *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996); *Cox v. Norris*, 958 F.

Supp. 411 (E.D. Ark. 1996); Jackson v. S.W.2d 383 (1998); Jones v. State, 340 Ark. State, 330 Ark. 126, 954 S.W.2d 894 390, 10 S.W.3d 449 (2000); Copeland v. (1997); Kemp v. State, 335 Ark. 139, 983 State, 343 Ark. 327, 37 S.W.3d 567 (2001).

5-4-603. Findings required for death sentence — Harmless error review.

(a) The jury shall impose a sentence of death if the jury unanimously returns written findings that:

- (1) An aggravating circumstance exists beyond a reasonable doubt;
- (2) Aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstance found to exist; and
- (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if the jury finds that:

- (1) Aggravating circumstances do not exist beyond a reasonable doubt;
- (2) Aggravating circumstances do not outweigh beyond a reasonable doubt any mitigating circumstance found to exist; or
- (3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make any finding required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

(d)(1) On an appellate review of a death sentence, the Supreme Court shall conduct a harmless error review of the defendant's death sentence if:

- (A) The Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance for any reason; and
- (B) The jury found no mitigating circumstance.

(2) The Supreme Court shall conduct a harmless error review under subdivision (d)(1) of this section by determining that a remaining aggravating circumstance:

- (A) Exists beyond a reasonable doubt; and
- (B) Justifies a sentence of death beyond a reasonable doubt.

(e) If the Supreme Court concludes that the erroneous finding of any aggravating circumstance by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

History. Acts 1975, No. 280, § 1302; 1977, No. 474, § 11; A.S.A. 1947, § 41-1302; Acts 1987, No. 412, § 1.

RESEARCH REFERENCES

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Sections 5-4-602 — 5-4-605 do not place an impermissible burden on the exercise of the constitutional right to trial by jury; since, under this section the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Ruiz v. State*, 275 Ark. 410, 630 S.W.2d 44, cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982).

This section, which sets out the findings required for a death sentence, is not unconstitutional. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

The claim that the Arkansas statutory scheme regarding capital murder is unconstitutional in that it does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, was rejected where the evidence showed that the blame for victim's murder rested with near equality on all of the defendants. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Since this sentencing statute does not

require a mandatory death sentence, but rather establishes criteria which must be strictly met before a death sentence shall be imposed, it is not unconstitutional. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987).

This section does not violate the Eighth Amendment, and this section as applied did not violate defendant's right to due process. *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992), cert. denied, 506 U.S. 964, 113 S. Ct. 435, 121 L. Ed. 2d 355 (1992).

The argument that the provisions in this section are unconstitutional because they prohibit the jury from exercising mercy, and therefore amount to a mandatory death penalty, held without merit. *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997).

The "shall impose" language of this section is constitutional; the jury has the option of mercy and shall return a sentence of death only if certain conditions are met. *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998).

This section, in conjunction with § 5-4-604, constitutionally narrows the class of persons eligible for the death penalty. *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998).

This section is constitutional. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

This section does not unconstitutionally provide for the mandatory imposition of the death sentence; a jury may show mercy simply by finding that the aggravating circumstances do not justify the imposition of a death sentence. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

Subsection (a) is constitutional, notwithstanding the contention that it mandates the imposition of the death penalty and does not allow the jury to show mercy. *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999).

The statute does not require a mandatory death penalty and, therefore, is not unconstitutional. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

In General.

This section provides for the narrowing of the death eligible class in the penalty phase of the trial. *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800, cert. denied, 505 U.S. 1225, 112 S. Ct. 3043, 120 L. Ed. 2d 911 (1992).

This section is properly applied where the jury is instructed that it can, by finding that circumstances will not warrant the imposition of the death penalty, return a verdict of life without parole. *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989).

Application of this section does not result in a mandatory death sentence. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001).

Applicability.

The court may conduct a harmless-error analysis if the jury found no mitigating circumstances, or when the jury makes an error in finding that an aggravating circumstance exists. *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

Aggravating or Mitigating Circumstances.

During the penalty stage of a capital murder trial, the state was not required to repeat evidence of aggravating circumstances in addition to any such evidence previously presented during the guilt or innocence phase of the trial. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976) (decision under prior law).

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Where the jury found that aggravating circumstances existed and that no mitigating circumstances existed, the facts supported the sentence of death. *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Jury must find not only that the aggravating circumstances outweigh the mitigating circumstances, but also that the aggravating circumstances justify a sentence of death beyond a reasonable doubt as required by subdivision (a)(3) of this section. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

This section requires only that the jury unanimously find at least one of the aggravating circumstances set out in § 5-4-604 to exist before it can impose the death penalty; accordingly, where the jury found one aggravating circumstance, it could properly impose the death penalty. *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Jury's finding that the aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstances was supported by the evidence. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Any relevant mitigating evidence concerning a defendant's character should not be excluded; such evidence may include defendant's behavior and conduct that existed not only before, and at time of the crime, but also that which occurred before sentencing and during the period of post-conviction relief, should a later resentencing occur. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, cert. denied, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

It is a matter of judgment whether the facts support the jury's findings as to the issues of aggravating and mitigating circumstances, but an appellate court will not substitute its judgment for that of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory requirements. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Although petitioner claimed that his attorney was ineffective in not objecting to the prosecutor's statement in his closing argument during the penalty phase that if the jury finds aggravating circumstances

which outweigh the mitigating circumstances, they should sentence him to death, it was held that, while this section actually provides that to sentence a defendant to death the jury must also find that the aggravating circumstances must justify a sentence of death, the petitioner failed to prove that he was prejudiced by the omission; it was unlikely that the addition of the omitted phrase would have resulted in a different sentence. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

Even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances under this section the jury may nevertheless reject the penalty of death if it finds the aggravating circumstances do not justify a penalty of death beyond a reasonable doubt. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), *aff'd*, 8 F.3d 614 (8th Cir. 1993).

While the aggravating circumstance in § 5-4-604(3) does not place any time restriction on which violent crimes may be considered, the jury must still find, pursuant to subdivision (a)(3) of this section, that the aggravating circumstances justify a sentence of death beyond a reasonable doubt; thus, in the event the jury finds that the defendant committed a violent crime many years ago, it may take into account that the previous crime was nothing more than one moment's indiscretion as a youth and reject the penalty of death on that basis. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), *aff'd*, 8 F.3d 614 (8th Cir. 1993).

Defendant's argument that, had the trial court instructed the jury on lesser-included offenses to terroristic threatening and aggravated assault, the jury might have found that he committed one or more misdemeanors, which would not have triggered the prior felony aggravating circumstances, held without merit; even if the jury had found the prior felony aggravating circumstance, it could only impose a sentence of death after considering (i) whether this aggravating circumstance justified a sentence of death, and (ii) whether this aggravating circumstance outweighed any mitigating circumstances found to exist. *Parker v. Norris*, 64 F.3d 1178 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095, 116 S. Ct. 820, 133 L. Ed. 2d 764 (1996).

Aggravating circumstance existed be-

yond a reasonable doubt, where defendant had previously threatened a law enforcement officer with a butcher knife, which was the offense for which defendant was currently on parole. *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995), *cert. denied*, 516 U.S. 1030, 116 S. Ct. 676, 133 L. Ed. 2d 525 (1995).

In death penalty case, proof of a prior felony involving violence was sufficient as a aggravating circumstance. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), *cert. denied*, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Where the jury unanimously found two mitigating circumstances on each count: (1) Appellant grew up in an environment of abuse and alcoholism; and (2) appellant grew up in an environment where his father provided an example of extreme violent reactions to situations, the Supreme Court must reverse for resentencing the death sentences on the counts relating to three shooting victims. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996), *cert. denied*, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 334 (1996).

Where sentencing jury clearly found that one aggravating factor existed, that the aggravating factor outweighed any mitigating factors, and that the death penalty was justified, the court applied the analysis under subsection (d) and determined that the inconsistent findings regarding a mitigating factor were harmless error and affirmed the death penalty sentence. *Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004).

Death sentence imposed on defendant convicted of capital murder was reversed because confusion led the jury to disregard any consideration of mitigating circumstances; no polling of the jury regarding any mitigating circumstance took place and the jury manifestly erred by marking the box that there was no evidence presented of any mitigators, despite the fact that an abundance of such evidence was, in fact, presented. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Defendant's due process rights were not violated by trial court's refusal to authorize funds to hire a psychiatrist to testify at the sentencing part of defendant's capital murder trial as the assistance of a doctor who participated in the competency evaluation in the defense met the require-

ments of *Ake v. Oklahoma*. *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005).

Burden of Proof.

This section clearly requires findings of aggravators beyond a reasonable doubt. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), cert. denied, 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1051 (1997).

Death Penalty.

The state may, if it chooses, resentence defendant whose death sentence was set aside because jury considered an invalid aggravating circumstance, relying on the remaining aggravating circumstance and any others which it might be able to prove. *Perry v. Lockhart*, 656 F. Supp. 46 (E.D. Ark. 1986), aff'd in part, rev'd in part, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Death sentence was not invalid because the trial court instructed the jury on pecuniary gain as an aggravating circumstance, and this aggravating circumstance did not violate U.S. Const. Amend. 8 by improperly duplicating an element of the robbery/murder offense with which he was convicted. Duplicative nature of Arkansas's statutory aggravating circumstance of pecuniary gain where the defendant is convicted of robbery/murder does not render the defendant's sentencing infirm, since the constitutionally-mandated-narrowing function was performed at the guilt phase. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Discretion of Court and Jury.

This section provides that the jury shall impose a sentence of death if it returns certain written findings, but the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Juries are not bound to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances; whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consid-

eration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Jury, irrespective of its findings under these provisions, can still return a life verdict without parole simply by rejecting the death penalty. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, cert. denied, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

This section does not contain a binding instruction, i.e., does not require a mandatory death sentence, but rather provides specified criteria that must be fully satisfied before the death sentence can be imposed; this section provides that a jury is free to sentence to life without parole if it finds the aggravating circumstances do not "justify" death. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Jury cannot ignore a stipulated mitigating factor. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Evidence.

Evidence sufficient to find that death penalty was not wantonly, arbitrarily or freakishly imposed, and was not excessive in relation to the crime and the jury's verdict was relatively free of passion or prejudice. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Evidence supported the jury's finding that defendant had previously committed another felony, an element of which was the use of threat of violence to another person. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Evidence sufficient to support jury's finding that no mitigating factors existed. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Where the prosecutor only admitted the conviction judgment of a previously committed felony into evidence to establish an aggravating circumstance at the sentencing phase of defendant's trial, and that

previous judgment was later reversed, the use of the previous conviction was prejudicial and the defendant was entitled to be resentenced. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

Where, in a prosecution for capital murder, the jury found two aggravating circumstances and did not find any mitigating factors, imposition of the death penalty was upheld. *Henderson v. State*, 311 Ark. 398, 844 S.W.2d 360 (1993).

Jurors.

This section contemplates that persons on the jury will be capable of imposing the death penalty; accordingly, it was not error for the trial court to strike for cause persons who stated that they could not under any circumstances impose the death penalty. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

State's questioning of venire persons regarding the imposition of death for the murder of a single person did not lead to a jury organized to return a verdict of death; the State was simply exploring whether the jurors could follow the court's instructions with respect to capital murder. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Justify.

Justification is an essential element for the imposition of a death sentence. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

Supreme Court Review.

The state Supreme Court may determine that subsection (d) of this section cannot be applied to the petitioner and/or that the court is without authority to reweigh the circumstances or apply harmless-error review. *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part and rev'd in part, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

If the Supreme Court is unable to conclude that the erroneous finding of an aggravating circumstance would not have changed the jury's decision to impose the death penalty, the sentence must be set aside. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

Where the jury foreman asked the trial judge whether the jury could consider another capital murder conviction as an

aggravating circumstance, it was impossible to surmise the amount of emphasis the jury gave this aggravating circumstance, and the Supreme Court was unable to conclude that the jury would have still imposed the death penalty; consequently case was remanded for resentencing. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

A defendant's death sentence may be affirmed using harmless error only if the error would not have changed the jury's decision to impose the death penalty. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

Because the result of the sentencing proceeding was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to make an objection to an improper aggravating factor, the failure to object did not constitute reversible "prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), cert. denied, 525 U.S. 846, 119 S. Ct. 115, 142 L. Ed. 2d 92 (1998).

The applicable statutory provisions as well as prior decisions of the Arkansas Supreme Court are crystal clear that the application of the reasonable doubt standard is required in appellate review of aggravating circumstances findings. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

The standards employed by the Arkansas Supreme Court to determine the sufficiency of the evidence to support the jury's findings, relative to the aggravating circumstances were not adequate; it is readily apparent that the standard employed by the Arkansas Supreme Court in reviewing the findings of the jury was a lesser standard than a "reasonable doubt" analysis. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

The Arkansas Supreme Court can perform the statutory harmless error analysis in the penalty phase only if the jury found no mitigating circumstances. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

Where there was no erroneous finding of any aggravating circumstance with respect to the death penalty, the Supreme Court would not conduct a harmless-error review under subsection (d). *Nance v.*

State, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

When the jury has made an error regarding mitigating circumstances, but no error regarding aggravating circumstances, such error would clearly be harmless if the jury unanimously found that several aggravating circumstances existed, that they outweighed beyond a reasonable doubt any mitigating circumstances found by any juror to exist, and that the aggravating circumstances justified beyond a reasonable doubt a sentence of death. *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Unanimous Return Required.

Where defendant had been convicted of capital murder, the failure of the jury to unanimously return a written finding that aggravating circumstances justified a sentence of death beyond a reasonable doubt required reversal of the sentencing phase. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997). See also *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

This section requires that the jury vote unanimously and perform a weighing test of the mitigating factors against the aggravating factors before it can impose the death penalty. *Jackson v. State*, 352 Ark. 359, — S.W.3d —, 2003 Ark. LEXIS 145 (2003).

Death penalty upheld where the trial court did not direct the jury to impose the death penalty, but properly instructed the jury to correct an error made in completing the verdict form, and the jury unanimously agreed that there were no mitigating circumstances. *Jackson v. State*, 352 Ark. 359, — S.W.3d —, 2003 Ark. LEXIS 145 (2003).

Verdict Forms.

This section requires the jury to complete three verdict forms: the first deals with aggravating circumstances, where the jury checks off any of the statutory aggravating circumstances found to exist beyond a reasonable doubt; the second form similarly deals with mitigating circumstances, where the jury identifies those which are unanimously found to exist, those which fewer than all of the jurors believe exist, and those for which

there is evidence but which the jurors unanimously agree do not exist; and the third verdict form deals with whether any existing aggravating circumstances outweigh any existing mitigating circumstances and whether the aggravating circumstances justify a death sentence. *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

Defendant's death sentence was reversed and remanded for resentencing because verdict Form 2 was not signed or filed and, therefore, the court was unable to say that the jury considered any possible mitigating circumstances, much less that it concluded that beyond a reasonable doubt that the only aggravating circumstance outweighed any mitigating circumstances. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), cert. denied, 540 U.S. 1050, 124 S. Ct. 832, 157 L. Ed. 2d 699 (2003).

Victim Impact Evidence.

Inmate who had been sentenced to death was incorrect in his argument that victim impact procedure was inadequate in not requiring the jury to find proof beyond a reasonable doubt as to victim statements; the court also specifically rejected the notion that victim-impact evidence is an aggravating circumstance or that it violates the statutory weighing process set out in §§ 5-4-603 through 5-4-605. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied, — U.S. —, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

Cited: *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980); *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985); *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734 (1988); *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989); 871 F.2d 1395 (8th Cir.); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991); *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991); *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992); *Whitmore v. Lockhart*, 8 F.3d 614 (8th Cir. 1993); *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), aff'd in part, rev'd in part, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998);

Ruiz v. Norris, 868 F. Supp. 1471 (E.D. Ark. 1994); Dansby v. State, 319 Ark. 506, 893 S.W.2d 331 (1995); Sasser v. State, 321 Ark. 438, 902 S.W.2d 773 (1995); Porter v. State, 321 Ark. 555, 905 S.W.2d 835 (1995); Nooner v. State, 322 Ark. 87, 907 S.W.2d 677 (1995); Lee v. State, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed. 2d 412 (1997); Riggs v. State, 339 Ark. 111, 3 S.W.3d 305 (1999); Isom v. State, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

5-4-604. Aggravating circumstances.

An aggravating circumstance is limited to the following:

(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim or caused the death of more than one (1) person in the same criminal episode;

(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) The capital murder was committed for pecuniary gain;

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function;

(8)(A) The capital murder was committed in an especially cruel or depraved manner.

(B)(i) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.

(ii)(a) "Mental anguish" means the victim's uncertainty as to his or her ultimate fate.

(b) "Serious physical abuse" means physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.

(c) "Torture" means the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

(C) For purposes of subdivision (8)(A) of this section, a capital murder is committed in an especially depraved manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder;

(9) The capital murder was committed by means of a destructive device, bomb, explosive, or similar device that the person planted, hid,

or concealed in any place, area, dwelling, building, or structure, or mailed or delivered, or caused to be planted, hidden, concealed, mailed, or delivered, and the person knew that his or her act would create a great risk of death to human life; or

(10) The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because:

(A) Of either a temporary or permanent severe physical or mental disability which would interfere with the victim's ability to flee or to defend himself or herself; or

(B) The person was twelve (12) years of age or younger.

History. Acts 1975, No. 280, § 1303; 1977, No. 474, § 12; 1985, No. 833, § 1; A.S.A. 1947, § 41-1303; Acts 1991, No. 683, §§ 3, 4; 1995, No. 1205, § 1; 1997, No. 946, § 1; 2001, No. 308, § 1.

A.C.R.C. Notes. Acts 1995, No. 1205, § 2, provided: "Legislative History. This is to memorialize the Arkansas Supreme Court's decision in *Cox v. State*, 313 Ark. 184 (1993), recognizing that Arkansas Code Annotated § 5-4-604(4) applies when a defendant knowingly creates a grave risk of death to another person in addition to the victim of the offense."

Amendments. The 2001 amendment redesignated former (8)(B) as present (8)(B)(i) and (8)(B)(ii); deleted "this" following "For purposes of" in (8)(B)(i); substituted "subdivision (8)(A) of this section" for "subdivision (8)" in (8)(B)(i) and (8)(C); inserted "or her" in (9); redesignated former (10) as present (10) and (10)(A); added (10)(B); and made minor stylistic changes.

Cross References. Obstructing governmental operations, § 5-54-101 et seq.

RESEARCH REFERENCES

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—In General.

The defendant's argument that the capital murder sentencing statutes are unconstitutionally vague in that the aggravating circumstances of this section are too closely related to the elements of capital felony murder was explicitly rejected because the aggravating circumstances are not an element of capital murder. *Henderson v. State*, 279 Ark. 414, 652

S.W.2d 26 (1983), cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

Subdivision (8) (since amended) held to be too broad and vague to be sustained under the Eighth and Fourteenth Amendments to the United States Constitution. *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734, modified, 295 Ark. 692A, 752 S.W.2d 762 (1988).

Subdivision (5) held not to be unconstitutionally vague or overbroad. *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, cert. denied, 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991).

The aggravating circumstance providing that the murder was committed for the purpose of avoiding or preventing an arrest, is not vague, overbroad, nor fails to narrow and channel the jury's discretion in determining the appropriateness of punishment. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd, 8 F.3d 614 (8th Cir. 1993).

This section adequately narrows the class of death-eligible defendants and enables the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. *Whitmore v. Lockhart*, 8 F.3d 614 (8th Cir. 1993).

The homicide statutes' 1989 revisions, which upgraded "premeditated and deliberated" murder from first-degree murder to capital murder, did not violate the constitutional prohibition against sentencing guidelines that fail to sufficiently narrow jury discretion in death penalty cases, because under this section's revised capital sentencing scheme, the constitutionally-required narrowing function is provided by the "aggravating circumstance" requirement at the penalty phase. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

Subdivisions (5) and (8) held not to be so overbroad or vague as to be unconstitutional. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

The aggravating factor in subdivision (5), that defendant committed murder to avoid or prevent arrest, is not unconstitutionally vague and overbroad because the statutory definition is specific enough to guide the jury and to avoid arbitrary and capricious imposition of the death penalty.

Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996), cert. denied, 519 U.S. 968, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996).

The "especially cruel" aggravating circumstance is not vague or overbroad. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), cert. denied, 520 U.S. 1242, 117 S. Ct. 1848, 137 L. Ed. 2d 1051 (1997).

Subdivision (8) of this section is not unconstitutional. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Duplication of an element of a capital offense by one or more aggravating circumstances does render the death penalty scheme unconstitutional. *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998).

—Effect of Amendments.

The legislature rewrote the aggravating circumstances in 1991 and based the statutory definitions of "especially cruel manner" and "especially depraved manner" on the Arizona Supreme Court's limiting interpretation of its "especially heinous, cruel or depraved" aggravating circumstance that had been found by the United States Supreme Court to pass constitutional muster. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

—Ex Post Facto Application.

The "cruel or depraved manner" aggravating circumstance, which had not been enacted at the time the crime was committed, is not a merely procedural provision and could not be applied ex post facto. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

—Standing.

Defendant had no standing to contest the constitutionality of the death penalty and the application of subdivision (8) in particular, because he received a lesser sentence. *King v. State*, 312 Ark. 89, 847 S.W.2d 37 (1993).

Purpose.

The reason for subdivision (3) is to allow the state to show that the defendant has a character for violent crimes or a history of committing such crimes. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

The purpose of aggravating circum-

stances is to qualify a defendant for the death penalty. *Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993).

Applicability.

Subdivision (3) of this section applies to crimes not connected in time or place to the killing for which the defendant has just been convicted. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987); *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Additional Factors.

In 1993, § 5-4-602 was amended to allow the state to present additional evidence in aggravation beyond the enumerated statutory factors by providing for the introduction of "any other matter relevant to punishment," including, but not limited to, victim-impact evidence. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

It appears that before 1993 Arkansas would not permit victim impact evidence or evidence of future dangerousness or evidence of any other aggravating circumstances not listed in this section; however, the Arkansas Supreme Court has, albeit sub silentio, previously approved arguments concerning future dangerousness. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Appellate Review.

The applicable statutory provisions as well as prior decisions of the Arkansas Supreme Court are crystal clear that the application of the reasonable doubt standard is required in appellate review of aggravating circumstances findings. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

The standards employed by the Arkansas Supreme Court to determine the sufficiency of the evidence to support the jury's findings, relative to the aggravating circumstances, were not adequate; it is readily apparent that the standard employed by the Arkansas Supreme Court in reviewing the findings of the jury was a lesser standard than a "reasonable doubt" analysis. *Miller v. Lockhart*, 861 F. Supp.

1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

Avoiding Arrest.

A complaint and warrant for defendant's unlawful flight to avoid prosecution, was admissible to show that the shooting was for the purpose of avoiding or preventing a lawful arrest. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

The aggravating circumstance that the murder was committed to avoid arrest or to effect escape from custody was properly submitted to the jury and was not vague and overbroad where, under the facts of the case, the jury was justified in finding that defendant shot victim to increase his chances of avoiding arrest. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Aggravating circumstance (5) was not vague and overbroad as applied to case. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, cert. denied, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Although a consequence of every murder is the elimination of the victim as a potential witness, avoiding arrest is not necessarily an invariable motivation for killing. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd, 8 F.3d 614 (8th Cir. 1993).

The aggravating circumstance providing that the murder was committed for the purpose of avoiding or preventing an arrest does not unconstitutionally duplicate an element of the underlying felony of robbery, since avoiding arrest is not necessarily an invariable motivation for killing; the aggravating circumstance of avoiding arrest does not as a matter of logic necessarily duplicate an element of the underlying capital crime of robbery. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd, 8 F.3d 614 (8th Cir. 1993).

Killing an informant to eliminate a witness is the same thing as avoiding or preventing a lawful arrest and is an aggravating circumstance under subdivision (5) of this section. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

If a murder is committed during a robbery, it is reasonable to infer that the murder was committed to ensure that the defendant would not be reported and arrested; where defendant did not dispute

the sufficiency of the finding that victim was murdered during a robbery, the court should not have held that insufficient evidence existed that defendant committed the murder in order to avoid arrest. *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995).

Jury's guilt-phase finding that in the course of committing robbery, defendant caused the death of person under circumstances manifesting extreme indifference to the value of human life, did not conflict with its penalty-phase finding of the aggravating circumstance that the murder was committed purposely to avoid arrest; any higher intent requirement at the penalty phase simply supported the aggravating circumstance and further narrowed the class of murderers eligible for death penalty. *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996), cert. denied, 519 U.S. 968, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996).

The evidence supported the jury's conclusion that the defendant committed murder for the purpose of preventing his arrest on other crimes where the primary motivation for kidnapping, beating, and killing the victim was that he had informed the police about the criminal activities of the defendant and others. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

In a prosecution for the murder of the defendant's wife and her two sons, the evidence supported the submission of the aggravating circumstance that the murders were committed for the purpose of avoiding or preventing arrest where (1) the defendant first killed his wife and then killed one son in his bed and the other son as he entered the house, (2) the sons were the only potential witnesses to the homicide of the wife, and (3) the nature of the sons' wounds did not support an inference that the defendant accidentally hit them with a knife when he was trying to fend them off. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

In a prosecution for capital felony murder on the basis that the defendant killed a child during the course of and in furtherance of raping her under circumstances manifesting extreme indifference to the value of human life, a jury finding of the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing arrest did not im-

properly elevate the requisite mental state for the charged crime since that crime required proof of deliberate conduct by the defendant and the requirement of deliberate conduct was consistent with the conclusion that the decision to kill the child, after raping her, was motivated by the defendant's desire or purpose to avoid arrest. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

In defendant's capital murder case, the court did not err by allowing the submission of the aggravating factor that the capital felony murder was committed to avoid or prevent an arrest since the jury could have readily found that defendant sought to kill both victims to eliminate them as witnesses and, thus, prevent his arrest. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

Cruel or Depraved Manner.

There was substantial evidence before the jury to support the finding that the aggravating circumstance existed beyond a reasonable doubt in each of two counts of capital murder where (1) the means of inflicting death on one victim was serious physical abuse that created a substantial risk of death which, when continued and intensified, did finally result in death, and (2) the other victim watched the defendant's attack on his brother and sister and must have suffered indescribable mental anguish and uncertainty as to his own ultimate fate as the defendant turned his attack upon him. *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998).

There was substantial evidence that defendant committed the murder in an especially cruel manner where the victim was bludgeoned, anally raped, and strangled, while her young daughter sat, bound to a chair, in an adjoining room. *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000).

Evidence was sufficient to support a determination that a murder was committed in an especially cruel or depraved manner where an expert testified that the victim was alive when his hands and feet were tied, when he was kicked and stabbed, when he was shot in the chest, and when his face was cut from mouth to ear. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied, 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

Given that defendant caused "deep-seated injuries" to a 12-year-old girl when defendant raped her, and given the fact that defendant strangled her afterwards, buried her body in the woods, and then threw her clothes into a nearby creek, there was sufficient evidence to support the aggravating circumstance found under Ark. Code Ann. § 5-4-604(8). *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Because there was ample testimony and evidence to support a finding that the victim suffered severe physical abuse as well as torture, there was sufficient evidence to support the jury's finding that the murder was committed in an especially cruel or depraved manner pursuant to subdivision (8)(A) of this section. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

There was sufficient evidence that the murder was committed in an especially cruel or depraved manner under subdivision (8)(A) of this section where, according to the state's expert, the victim would have lived several minutes after the first shot and a witness testified that several seconds passed between the first and second shots. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), cert. denied, 540 U.S. 1050, 124 S. Ct. 832, 157 L. Ed. 2d 699 (2003).

Death Penalty.

The state may, if it chooses, resentence defendant whose death sentence was set aside because jury considered an invalid aggravating circumstance, relying on the remaining aggravating circumstance and any others which it might be able to prove. *Perry v. Lockhart*, 656 F. Supp. 46 (E.D. Ark. 1986), aff'd in part, rev'd in part, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Death sentence was set aside as having been arrived at unconstitutionally because the jury may have relied upon its finding that the defendant had a pecuniary motive for committing the crime, a fact which is necessarily true in all cases of capital felony murder involving robbery. *Perry v. Lockhart*, 656 F. Supp. 46 (E.D. Ark. 1986), aff'd in part, rev'd in part, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

In passing subdivision (3) of this section, the General Assembly intended to narrow the class of persons exposed to the death penalty to those with a predisposition for violent acts. The state, during the guilt and innocence phase, can always prove other acts done at the same time as the principal crime to show the aggravated nature of the crime charged; furthermore, subdivision (8) of this section (since amended) allows the state, during the penalty phase, to show the murder was done in a particularly heinous manner. The reason, then, for subdivision (3) is to allow the state to show that the defendant has a character for violent crimes or a history of such crimes. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987).

Death sentence was not invalid because the trial court instructed the jury on pecuniary gain as an aggravating circumstance, and this aggravating circumstance did not violate U.S. Const. Amend. 8 by improperly duplicating an element of the robbery/murder offense with which he was convicted. Duplicative nature of Arkansas's statutory aggravating circumstance of pecuniary gain where the defendant is convicted of robbery/murder does not render the defendant's sentencing infirm, since the constitutionally-mandated-narrowing function was performed at the guilt phase. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

It was error to have permitted the jury to find defendant guilty of capital murder on the basis that it was committed in the course of burglary where the jury was not allowed to consider the robbery or any purpose for the entry of the victim's home independent of the acts which resulted in his death. *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988).

The death penalty may not be imposed unless the state can prove the existence of an "aggravating circumstance," so as to genuinely narrow the class of persons eligible for the death penalty. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

Due Process.

Insofar as former provisions governing sentencing for capital felonies limited the jury's consideration of aggravating cir-

cumstances for sentencing purposes to those enumerated, but did not limit consideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and posed no problem of due process. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Evidence was sufficient to find that the shooting at one victim was so closely connected in both time and place to the murder of other victims that it did not present a portrait of the defendant as having previously demonstrated a character for violent crimes or a history for committing such crimes so that it could not be used as an aggravating circumstance under subdivision (3). *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

It is a matter of judgment whether the facts support the jury's findings as to the issues of aggravating and mitigating circumstances, but an appellate court will not substitute its judgment for that of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory requirements. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Substantial evidence held to support jury's finding that prior felony conviction was an aggravating circumstance. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988).

Evidence was sufficient to establish the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing an arrest or affecting an escape from custody. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Death penalty verdict was not invalidated where jurors listed only aggravating factors permitted by this section and listed fear of detection as a mitigating factor; the juror's finding would not be disturbed since it was rational. *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988).

Great Risk of Death to One Other Than Victim.

Where other persons were in the direct line of fire of the defendant's gun, the trial court did not err in submitting to the jury the question whether he had created a great risk of death to one other than the victim. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978).

Where petitioner alleged that this section was unconstitutionally applied to him, since, at the penalty phase of the trial, the court instructed the jury that it could consider as an aggravating circumstance whether the defendant had knowingly created a great risk of death to a person other than the victim, the appellate court held that this ground was patently meritless, there being ample evidence that the petitioner knowingly created a great risk of death to a person other than the victim. *Swindler v. Lockhart*, 693 F. Supp. 760 (E.D. Ark. 1988), aff'd, 885 F.2d 1342 (8th Cir. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

This section covers actual deaths even though only "risk" is mentioned. *Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993).

Harmless error.

In a prosecution for murder, any error in allowing the jury to consider the aggravating factor that the murder was committed in an especially cruel or depraved manner was harmless where three other aggravating factors were found to exist and no mitigating factors were found to exist. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

Impermissible Considerations.

Neither the savagery of the attack nor the sadistic mind of the attacker is an aggravating circumstance the jury is allowed to consider. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Instructions.

Circuit judges are directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert.

denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Court did not err in allowing the state to prove all the defendant's prior felonies where the court clearly instructed the jury that they were to consider only those convictions which involved threats or violence as aggravating circumstances and that the other convictions were to be considered only for enhancement purposes. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

The circuit judge should not submit to the jury any aggravating or mitigating circumstances that are completely unsupported by any evidence; however, if there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982); *Swindler v. Lockhart*, 885 F.2d 1342 (8th Cir. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

Mandatory Sentence.

This section does not create a mandatory death sentence, since Awhatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

Multiple Deaths.

Using other homicides as aggravating factors is permissible. *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998).

In a prosecution for three murders, it was proper to allow the jury to consider the aggravating factor that the defendant caused the death of more than one person in the same criminal episode. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000).

Parole.

Contention that felony conviction from which defendant was paroled did not amount to an aggravating circumstance was without merit. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert.

denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1982).

Pecuniary Gain.

The phrase "pecuniary gain" was a matter of such common understanding and practice that it could not be said that an ordinary man or juror would have to speculate as to its meaning in its context as an aggravating circumstance in capital murder. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidence that the murder was committed for pecuniary gain. *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, rehearing denied, 434 U.S. 961, 98 S. Ct. 495, 54 L. Ed. 2d 322 (1977) (decision under prior law).

Whether the homicide was committed for pecuniary gain is a pertinent and proper fact for the jury's consideration in determining whether the death sentence should be imposed. *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259 (1977), cert. denied, 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979) (decision under prior law).

Prior Offenses.

Where accused admitted that he had previously pleaded guilty to several named charges, the fact that there was no crime technically labeled as such when he pleaded guilty to them did not prohibit the state from introducing those judgments of conviction as aggravating circumstances. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

Where the trial court allowed the jury to consider defendant's single previous conviction without supplying any details about the offense, the offense could not be considered as a felony creating the substantial risk of death or serious physical injury to another person, absent supporting proof, since the offense as defined could be committed with no possibility of violence or injury to anyone. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

In order for an offense to be admissible as an aggravating circumstance, pursuant to this section, the felony committed must include the use or threat of violence to another person, or the creation of substantial risk of death or serious physical injury to another person; sometimes a burglary could include this risk. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

It was error for the trial court to allow evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance; neither were these prior felonies proper for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Evidence of a prior manslaughter conviction is admissible as an aggravating circumstance. *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982), overruled in part on other grounds by *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The penalty phase of capital murder cases ought not to be turned into a separate trial for other crimes, but the legislature has made it plain in amending subdivision (3) that the state can offer evidence that a defendant "committed" another crime which involves an element of violence. *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983).

When the state in the penalty phase of capital murder cases attempts to prove another unrelated crime, without having evidence of a conviction, it does so at some risk and the trial court must prevent prejudicial evidence from reaching the jury; also, a defendant has a right to present rebutting evidence in such a case, just as in a trial. *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983).

Uncorroborated testimony was admissible where it was offered to prove aggravating circumstance that defendants previously committed a crime of violence. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

This section prohibits a person convicted of a felony from possessing a firearm, regardless of the fact that the prior

felony conviction is subject to collateral attack, and this prohibition continues until the conviction is either successfully attacked and set aside, or a specific pardon is granted; therefore, there was no error in the trial court admitting evidence of the defendant's prior felony conviction which the defendant claimed was subject to collateral attack on constitutional grounds. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Where the crimes used to prove an aggravated circumstance involved other victims, in another place and previously in time to the principal crime for which defendant was convicted, they were properly used as an aggravating circumstance. *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987).

Although § 5-4-602(4) provides that, in determining the sentence, evidence concerning mitigating circumstances may be presented regardless of the rules of evidence, but "evidence relevant to the aggravating circumstances ... shall be governed by the rules governing the admission of evidence ...," Evid. Rule 609 does not prevent the use of prior convictions if more than 10 years have elapsed since the date of the prior conviction. Evidence Rule 609 only prevents the use of prior convictions more than 10 years old for impeachment purposes; it is based upon the concept that a crime committed more than 10 years ago is no longer probative of a witness's truthfulness at the time of trial. On the other hand, this section, the aggravating circumstances statute, is not concerned with the defendant's character at the time of trial; instead, this section is concerned with disclosing whether the defendant's history establishes such a propensity for violence that it will reoccur. Therefore, Evid. Rule 609 does not prevent the introduction of felony convictions more than 10 years old to show a propensity to violence in the penalty phase. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988).

The admission of unsubstantiated allegations of prior offenses is prejudicial error in the penalty phase of the trial. While the state is not limited to admission of a prior conviction in proving that a defendant committed a prior felony, mere allegations do not constitute proof. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert.

denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

Constitutional error occurred during the penalty phase when the prosecutor used three nonviolent felonies as a non-statutory aggravating circumstance. *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), *aff'd in part, rev'd in part*, 28 F.3d 832 (8th Cir. 1994), *cert. denied*, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995).

The admission of defendant's prior convictions at the penalty phase was erroneous and had a substantial and injurious effect or influence on the jury's determination that defendant should receive the death penalty. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), *petition dismissed*, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), *aff'd sub nom. Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Implicit in the phrase in subdivision (3) of this section "previously committed another felony," which itself is supported by the statutory elaboration of the element of "the use of threat of violence" and "the creation of a substantial risk of death or serious physical injury," is at least the contemplation of a conviction; indeed, proof of a conviction serves to establish the aggravating circumstance of a previous violent felony. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), *cert. denied*, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

The fundamental thrust of this section is prospective; naturally, a violent felony that was committed after the killing in question (but which resulted in a conviction prior to the sentencing hearing) would have considerable bearing on a convicted murderer's propensity to "strike again." *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), *cert. denied*, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

A violent felony committed after a crime that warrants imposition of the death penalty may be considered as an aggravating circumstance in the sentencing phase when the conviction for the violent felony was entered prior to the sentencing trial. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), *cert. denied*, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

A death sentence that is predicated upon proof of the defendant's conviction of

an unrelated prior violent felony must be vacated if the prior violent felony is, subsequent to the imposition of the death penalty, reversed. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

The prosecution may prove previously uncharged prior felonies to establish the aggravating circumstance in subdivision (3). *Parker v. Norris*, 64 F.3d 1178 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095, 116 S. Ct. 820, 133 L. Ed. 2d 764 (1996).

This provision applies to crimes not connected to time and place of the killing for which the defendant has just been convicted. *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995).

There was no "double-counting" of aggravating factors where defendant (1) was shown to have a prior violent criminal history; and (2) had been imprisoned for that violent crime. *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997).

Evidence held insufficient to establish that the defendant committed a "prior violent felony"; evidence that the defendant abducted his niece and killed his brother in North Carolina did not establish that such acts were classified as felonies in North Carolina. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

Evidence was sufficient to establish that the defendant had previously committed another felony and that the prior felony necessarily involved use or threat of violence to another where the state introduced into evidence a criminal information and conviction judgment reflecting that the defendant had previously been found guilty of first degree battery. *Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999).

The trial court did not err in permitting the state to establish a subsection (3) aggravating circumstance by admission of a kidnapping conviction based upon an abduction occurring subsequent to the capital murder at issue. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

The jury's death-penalty deliberations were not adversely affected by any alleged mislabeling in the jury instructions of the defendant's three prior violent felonies as three aggravating circumstances rather than as three felonies supporting one aggravating circumstance. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000).

Because defendant admitted beating a man "half to death" and defendant's bat-

tery conviction and photographs of the battery victim were introduced into evidence, there was sufficient evidence to support the jury's finding of a prior felony conviction involving violence pursuant to subdivision (3) of this section. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Proof.

The same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Where jury was presented with proof of an aggravating circumstance that defendant had been convicted of felonies in other states but no details of the crimes were provided, there was no requirement that the state try a prior felony conviction a second time or that it present evidence that a prior conviction had as an element the use or threat of violence. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Where the mandated narrowing function was performed at the guilt phase, the fact that the aggravating circumstance duplicated one of the elements of the crime did not make the sentence constitutionally infirm. *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

The trial court did not err in admitting photographs of the victim at the penalty phase. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Time Limitations.

While the aggravating circumstance in subdivision (3) of this section does not place any time restriction on which violent crimes may be considered, the jury must still find, pursuant to § 5-4-603(a)(3), that the aggravating circumstances justify a sentence of death beyond a reasonable doubt; thus, in the event the jury finds that the defendant committed a violent crime many years ago, it may take into account that the previous crime was nothing more than one moment's indiscretion as a youth and reject the penalty of death on that basis. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd, 8 F.3d 614 (8th Cir. 1993).

Victim Impact Evidence.

The Victim Impact Statute, § 5-4-602(4), which permits the presentation of victim impact evidence, does not improperly create a new aggravator outside the state statutory scheme of aggravators set forth in this section. *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), aff'd, 322 F.3d 500 (8th Cir. 2003).

The presentation of victim impact evidence does not constitute a departure from the normal statutory sentencing scheme in which aggravating and mitigating factors are weighed such as to permit a jury to impose death for an impermissible reason such as sympathy or indignation. *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), aff'd, 322 F.3d 500 (8th Cir. 2003).

Inmate who had been sentenced to death was incorrect in his argument that victim impact procedure was inadequate in not requiring the jury to find proof beyond a reasonable doubt as to victim statements; the court also specifically rejected the notion that victim-impact evidence is an aggravating circumstance or that it violates the statutory weighing process set out in §§ 5-4-603 through 5-4-605. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied, — U.S. —, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

Cited: *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Collins v. Lockhart*, 545 F. Supp. 83 (E.D. Ark. 1982); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985); *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987); *Gardner v. State*, 297 Ark. 541, 764 S.W.2d 416 (1989); *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989); 871 F.2d 1395 (8th Cir.); *Hill v. Lockhart*, 719 F. Supp. 1469 (E.D. Ark. 1989); *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989); *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989); *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341 (1990); *Hill v. Lockhart*, 927 F.2d 340 (8th Cir. 1991); *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991); *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part and rev'd in part, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334

(1994); *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992); *Pickens v. Lockhart*, 802 F. Supp. 208 (E.D. Ark. 1992), *aff'd*, 4 F.3d 1446 (8th Cir. 1993), *cert. denied*, 510 U.S. 1170, 114 S. Ct. 1206, 127 L. Ed. 2d 553 (1994); *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), *cert. denied*, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), *cert. denied*, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998); *Wainwright v. Norris*, 872 F. Supp. 574 (E.D. Ark. 1994); *Rush v. State*, 324 Ark. 147, 919 S.W.2d 933 (1996); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996); *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), *cert. denied*, 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed. 2d 412 (1997); *Fretwell v. Norris*, 133 F.3d 621 (8th Cir. 1998), *cert. denied*, 525 U.S. 846, 119 S. Ct. 115, 142 L. Ed. 2d 92 (1998); *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

5-4-605. Mitigating circumstances.

A mitigating circumstance includes, but is not limited to, the following:

- (1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;
- (2) The capital murder was committed while the defendant was acting under an unusual pressure or influence or under the domination of another person;
- (3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
- (4) The youth of the defendant at the time of the commission of the capital murder;
- (5) The capital murder was committed by another person and the defendant was an accomplice and his or her participation was relatively minor; or
- (6) The defendant has no significant history of prior criminal activity.

History. Acts 1975, No. 280, § 1304; A.S.A. 1947, § 41-1304.

RESEARCH REFERENCES

Ark. L. Rev. Blume and Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev. 725.
Sullivan, Psychiatric Defenses in Arkansas Criminal Trials, 48 Ark. L. Rev. 439.
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CASE NOTES

ANALYSIS	Instructions.
Constitutionality.	Judicial review.
In general.	Other mitigating factors.
Applicability.	Prior criminal activity.
Abuse.	Religious and ethical considerations.
Due process.	Sentence.
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Victim impact evidence.
Youth of defendant.

Constitutionality.

The language used by the legislature in naming the various elements of mitigation could not be said to be vague and beyond the common understanding and practices of the ordinary man or juror so as to be constitutionally defective. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976) (decision under prior law).

The capital murder sentencing statutes are not unconstitutionally vague simply because this section does not contain a specific definition of "mitigating circumstance"; the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

In General.

Mitigating circumstances are not limited to the several mentioned in this section; the jury may take into account any circumstance which it considers to mitigate the seriousness of the crime. *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988).

This section outlines six explicit statutory mitigating circumstances, but juries may find anything to be a mitigating circumstance. *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

The mitigating circumstances that may be presented to the jury are not limited to those set out in the statute. *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998).

Applicability.

Mitigating circumstances, as typified by those listed in this section, are applicable only to the particular defendant, not to capital punishment in general. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Abuse.

Evidence of a background of abuse is both relevant and important to a jury's

determination of appropriate punishment. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), aff'd sub nom. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Had the jurors been provided information concerning the abuse defendant suffered as a child, along with evidence that he was intoxicated at the time of offense, they would have not imposed the death penalty. *Ford v. Lockhart*, 861 F. Supp. 1447 (E.D. Ark. 1994), petition dismissed, *In re Norris*, 38 F.3d 1046 (8th Cir. 1994), aff'd sub nom. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995).

Due Process.

Insofar as former section governing sentencing for capital felonies limited the jury's consideration of aggravating circumstances for sentencing purposes to those enumerated, but did not limit consideration of mitigating circumstances, it worked to the advantage rather than prejudice of a defendant and thus the sentencing procedures posed no problem of due process. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Evidence.

Court correctly refused to allow the defense to introduce pictures of a gas chamber, a gallows, and an electric chair, none of which could be regarded as a mitigating circumstance. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

It is a matter of judgment whether the facts support the jury's findings as to the issues of aggravating and mitigating circumstances, but an appellate court will not substitute its judgment for that of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory requirements. *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

The list of mitigating circumstances set out in this section consists of circumstances relating to the capital offense for which the defendant is being sentenced; this list is not exclusive, and a defendant may submit other circumstances for the jury's consideration. However, court re-

jected argument that jury must find a mitigating circumstance based on the definition of the prior offense of voluntary manslaughter as including acts arising from serious provocation by the victim. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

A jury is not required to believe the defendant's evidence and is not required to find a mitigating circumstance; a jury is not required to find a mitigating circumstance just because the defendant puts before the jury some evidence that could serve as the basis for finding the mitigating circumstance. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

A jury may generally refuse to believe a defendant's mitigating evidence, but when there is no question about credibility and, when, in addition, objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Photographs showing the crime scene with the victim present and photographs of the autopsy performed on the victim as the photographs were admissible as relevant to the State's robbery theory and to show that the fatal gunshot was a contact wound from the rear; evidence that defendant was arrested at a nearby liquor store after having just purchased some wine was admissible to show defendant's motive was robbery. *Matthews v. State*, 352 Ark. 166, 99 S.W.3d 403 (2003).

Fear of Detection.

Fear of detection would be an aggravating circumstance, not a mitigating one. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983).

Death penalty verdict was not invalidated where jurors listed only aggravating factors permitted by § 5-4-604 and listed fear of detection as a mitigating factor; the juror's finding would not be disturbed since it was rational. *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988).

Jury could view the murderer's fear of

detection as a mitigating circumstance as to the killing of the last three victims in that it at least provided an understandable, although twisted, motive, and therefore mitigated the coldbloodedness of those crimes. *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988).

Instructions.

Circuit judges are hereafter directed to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence. *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981).

The jury was erroneously instructed by the trial court that the jury must unanimously find that mitigating circumstances existed; accordingly, the jury was deprived of the right to assess the mitigating circumstances individually and weigh mitigating circumstances as each juror chose to do. Because of the disadvantage and impairment that the jury was confronted with in weighing and evaluating the aggravating circumstances as against mitigating circumstances, the jury would not have been justified in assessing the death penalty beyond a reasonable doubt. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

Instructions, together with forms with questions regarding unanimity on certain points, relating to mitigating circumstances found not to lead the jury to the misunderstanding that a unanimous vote is required before any mitigating circumstance may be found. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Judicial Review.

A harmless error analysis may not be applied to mitigating circumstances found by the jury. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995). See also *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

Other Mitigating Factors.

Even though defendant may have changed his life in prison, the jury could have found that this change was not a mitigating factor. *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied,

525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Counsel was not ineffective for refraining from investigating or presenting evidence concerning the physical and mental abuse the defendant suffered at the hands of his father as a child. *Fretwell v. Norris*, 133 F.3d 621 (8th Cir. 1998), cert. denied, 525 U.S. 846, 119 S. Ct. 115, 142 L. Ed. 2d 92 (1998).

Prior Criminal Activity.

It is important to note that subdivision (6) states "no significant prior history of criminal activity," and not "no significant prior history of prior convictions." *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Religious and Ethical Considerations.

Religious and philosophical approaches to the death penalty are not relevant as mitigating evidence. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Sentence.

The trial court had the authority to order defendant's two capital murder sentences to run consecutively under § 5-4-403(a); merger was not required by § 5-1-110(d)(1). *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

State of Mind.

Where the state adduced testimony from psychiatrist that defendant was examined by him and found to be without psychosis and to know right from wrong, the evidence justified the jury's finding that no mitigating circumstances existed. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgment left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976) (decision under prior law).

Imposition of the death penalty was justified where there was sufficient evidentiary support for the jury's failure to find, as a mitigating circumstance, that the defendant had no capacity for understanding the wrongfulness of his conduct or that he was mentally impaired or emotionally disturbed at the time of the crime. *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135, cert. denied, 434 U.S. 878, 98 S. Ct.

231, 54 L. Ed. 2d 158 (decision under prior law).

Where the only evidence of extreme emotional disturbance was the opinion testimony of clinical psychologists that emotional pressures in certain situations typically accompany the disorders said to belong to defendants, the testimony was general and the jury was not required to accept opinion as fact or even conclude that what was generally true was specifically true of these defendants. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The performance of defendant's lawyers at the guilt phase of his state court murder trial was deficient on account of their failure to present evidence of his history on anti-psychotic drugs and the likelihood that he had stopped taking them sometime within three to seven weeks before commission of the offense. *Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Defendant was not deprived of constitutionally-mandated psychiatric assistance. *Parker v. Norris*, 64 F.3d 1178 (8th Cir. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 820, 133 L. Ed. 2d 764 (1996).

Even if the opinions of the doctors at the state hospital, indicating that defendant suffered from multiple mental defects, had remained uncontradicted, which they did not, the jury would have been free to disbelieve them and find that punishment of defendant should not be mitigated by his mental condition. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Prosecutor properly stated the law concerning § 5-4-605(3), when the prosecutor reminded the jury of the psychological examiner's expert opinion of defendant's ability to appreciate the criminality of his conduct, to conform his conduct to the law, and then explained that because defendant was able to do both of these things the mitigating circumstances presented by the defense would not apply; the State was permissibly responding to defendant's claim of the presence of mitigating circumstances by impairment due to mental disease or defect. *Jackson v. State*, 352

Ark. 359, — S.W.3d —, 2003 Ark. LEXIS 145 (2003).

Totality of Circumstances.

Weighing the aggravating circumstances against the mitigating ones for sentencing purposes is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance but is a reasoned judgment to be exercised in light of the totality of the circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

Trial Proceedings.

In defendant's trial for two capital murders and aggravated robbery, defendant's argument that some third person, who may or may not have had a burn related to the burning of the victims in a car, and who may or may not have had a motive for revenge against one of the murder victims, should have been implicated as having committed the crimes for which defendant was charged, held without merit; the proposition was highly speculative and conjectural, and under both *Birmingham* and *Zinger*, the evidence was clearly not admissible. *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

Victim Impact Evidence.

Inmate who had been sentenced to death was incorrect in his argument that victim impact procedure was inadequate in not requiring the jury to find proof beyond a reasonable doubt as to victim statements; the court also specifically rejected the notion that victim-impact evidence is an aggravating circumstance or that it violates the statutory weighing process set out in §§ 5-4-603 through 5-4-605. *Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied, — U.S. —, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

Youth of Defendant.

While chronological age does not necessarily control in the jury's determination of whether a defendant's youth is a mitigating circumstance, it is an important factor which must still be weighed in light of varying conditions and circumstances. *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977) (decision under prior law).

This section does not define youth in terms of mere chronological age; the term "youth" must be considered as relative and this factor weighed in the light of varying conditions and circumstances. *Hill v. Lockhart*, 927 F.2d 340 (8th Cir. 1991), cert. denied, 502 U.S. 927, 112 S. Ct. 344, 116 L. Ed. 2d 283 (1992).

Cited: *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983); *Singleton v. Lockhart*, 653 F. Supp. 1114 (E.D. Ark. 1986); *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988); *Hill v. Lockhart*, 719 F. Supp. 1469 (E.D. Ark. 1989); *Rector v. Lockhart*, 727 F. Supp. 1285 (E.D. Ark. 1990); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991); *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part and rev'd in part, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994); *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992); *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), aff'd, 8 F.3d 614 (8th Cir. 1993); *Whitmore v. Lockhart*, 8 F.3d 614 (8th Cir. 1993); *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), aff'd in part, rev'd in part, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995); *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed. 2d 412 (1997).

Jackson v. State, 352 Ark. 359, 105 S.W.3d 352 (2003); *Beulah v. State*, 352 Ark. 472, 101 S.W.3d 802 (2003).

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall:

- (1) Be remanded to the custody of the Department of Correction for imprisonment for the remainder of his or her life; and
- (2) Not be released except pursuant to commutation, pardon, or reprieve of the Governor.

History. Acts 1975, No. 280, § 1305;
A.S.A. 1947, § 41-1305.

CASE NOTES

ANALYSIS

Imposition.

Possible release.

Imposition.

A sentence of "life in prison" or "straight life" is distinguishable from "life imprisonment without parole"; the former sentence may be imposed for conviction on a Class Y felony, such as rape, but the latter sentence may be imposed only for conviction of capital murder. *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), cert. denied, 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed. 2d 686 (1994).

Possible Release.

Counsel was not ineffective for failing to make a meritless argument where the prosecutor objected to defense counsel's plea for the jury to impose a life sentence without parole, which he claimed would keep defendant from ever getting out of prison; the prosecutor correctly stated that a person sentenced to life imprisonment could be released pursuant to commutation, pardon, or reprieve of the governor. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

5-4-607. Application for executive clemency — Regulations.

(a) The pardon of a person convicted of capital murder, § 5-10-101, or of a Class Y felony, Class A felony, or Class B felony, or the commutation of a sentence of a person convicted of capital murder, § 5-10-101, or of a Class Y felony, Class A felony, or Class B felony, may be granted only in the manner provided in this section.

(b)(1) A copy of the application for pardon or commutation shall be filed with:

(A) The Secretary of State;

(B) The Attorney General;

(C) The sheriff of the county where the offense was committed;

(D) The prosecuting attorney of the judicial district where the applicant was found guilty and sentenced, if still in office, and, if not, the successor of that prosecuting attorney;

(E) The circuit judge presiding over the proceedings at which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of that circuit judge; and

(F) The victim of the crime or the victim's next of kin, if he or she files a request for notice with the prosecuting attorney.

(2)(A) The application shall set forth a ground upon which the pardon or commutation is sought.

(B) If the application involves a conviction for capital murder, § 5-10-101, a notice of the application shall be published by two (2) insertions, separated by a minimum of seven (7) days, in a newspaper of general circulation in the county or counties where the offense or offenses of the applicant were committed.

(c) On granting an application for pardon or commutation, the Governor shall:

(1) Include in his or her written order the reason for the granting of the application; and

(2) File with the House of Representatives and the Senate a copy of his or her written order which shall state the:

(A) Applicant's name;

(B) Offense of which the applicant was convicted and the sentence imposed;

(C) Date of the judgment imposing the sentence; and

(D) Effective date of the pardon or commutation.

(d) A person sentenced to death or to life imprisonment without parole is not eligible for parole and shall not be paroled.

(e) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years, the person shall not be paroled, nor shall the length of his or her incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent order of commutation.

(f) A reprieve may be granted as presently provided by law.

History. Acts 1975, No. 280, § 1306; 1977, No. 474, § 13; A.S.A. 1947, § 41-1306; Acts 1991, No. 706, § 1; 1993, No. 741, § 1; 1999, No. 498, § 1; 2001, No. 201, § 1; 2003, No. 1169, § 1; 2005, No. 1975, § 1; 2005, No. 2097, § 1.

A.C.R.C. Notes. This section is set out above as amended by Acts 2005, No. 1975, § 1, which repealed former subsection (d). Former subsection (d) was also amended by Acts 2005, No. 2097, § 1, to read as follows:

"(d)(1) Except as provided in subdivision (d)(3) of this section, any person who has been convicted of capital murder, § 5-10-101, or of any Class Y or Class A felony, excluding nonviolent offenses under the Uniform Controlled Substances Act, § 5-64-101 et seq., and who makes an application shall not be eligible to reapply for a period of four (4) years after the date of filing of the application that was denied, except that a person whose application was denied by the Governor after receiving a majority vote by the Post Prison Transfer Board in favor of the application is eligible to reapply one (1) year after the date the application was denied by the Governor.

"(2) Any person who made an application for pardon or commutation that was denied on or after July 1, 2004, shall be eligible to reapply for pardon or commutation four (4) years after the date of filing of the application that was denied.

"(3)(A) The Post Prison Transfer Board

may waive the waiting period for filing a new application for pardon or commutation described in subdivision (d)(1) of this section if:

"(i) It has been at least twelve (12) months after the date of the filing of the application that was denied; and

"(ii) The Post Prison Transfer Board determines that the person whose application was denied has established that:

"(a) New material evidence relating to the person's guilt or punishment has been discovered;

"(b) The person's physical or mental health has substantially deteriorated; or

"(c) Other meritorious circumstances justify a waiver of the waiting period.

"(B)(i) The Board of Corrections shall promulgate rules that will establish policies and procedures for waiver of the waiting period.

"(ii) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq."

Amendments. The 2001 amendment inserted "excluding nonviolent offenses under the Uniform Controlled Substances Act, § 5-64-101 et seq." in former (d)(1).

The 2003 amendment added "except that a person ... by the Governor" in former (d)(1).

The 2005 amendment by No. 1975 repealed former (d).

Cross References. Executive Clemency, § 16-93-204.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CASE NOTES

In General.

The Governor has absolute discretion in granting or denying executive clemency; however, the decision must be made after

mandated statutory procedures have been completed. *Perry v. Brownlee*, 927 F. Supp. 480 (E.D. Ark. 1997).

5-4-608. Waiver of death penalty.

(a) If a defendant is charged with capital murder, with the permission of the court the prosecuting attorney may waive the death penalty.

(b) In a case described in subsection (a) of this section, if the defendant pleads guilty to capital murder or is found guilty of capital murder after trial to the court or to a jury, the trial court shall sentence the defendant to life imprisonment without parole.

History. Acts 1975, No. 280, § 1307; 1977, No. 474, § 14; A.S.A. 1947, § 41-1307.

5-4-609 — 5-4-614. [Reserved.]**5-4-615. Conviction — Punishments.**

A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter.

History. Acts 1973, No. 438, § 6; 1975, No. 928, § 17; A.S.A. 1947, § 41-1351.

CASE NOTES

Constitutionality.

The death penalty per se is not violative of the federal Eighth and Fourteenth Amendments. *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978).

Cited: *Collins v. State*, 259 Ark. 8, 531

S.W.2d 13 (1975); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975); vacated insofar as judgments left undisturbed the death penalty imposed, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976); *Emerson v. State*, 43 Ark. 372 (1884).

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

(a) Notwithstanding § 5-4-602(3) that requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:

(1)(A) Upon any appeal by the defendant when the sentence is of death, if the appellate court finds prejudicial error in the sentencing

proceeding only, the appellate court may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced.

(B) No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony.

(C) When a capital case is remanded after vacation of a death sentence, the prosecutor may move the trial court to:

(i) Impose a sentence of life without parole, and the trial court may impose the sentence of life without parole without a hearing; or

(ii) Impanel a new sentencing jury;

(2) If the prosecutor elects subdivision (a)(1)(C)(ii) of this section the trial court shall impanel a new jury for the purpose of conducting a new sentencing proceeding;

(3) A new sentencing proceeding is governed by the provisions of §§ 5-4-602(4) and (5) and 5-4-603 — 5-4-605;

(4)(A) Any exhibit and a transcript of any testimony or other evidence properly admitted in the prior trial and sentencing is admissible in the new sentencing proceeding.

(B) Additional relevant evidence may be admitted including testimony of a witness who testified at the previous trial; and

(5) The provisions of this section:

(A) Are procedural; and

(B) Apply retroactively to any defendant sentenced to death after January 1, 1974.

(b) This section shall not be construed to amend a provision of § 5-4-602 requiring the same jury to sit in both the guilt and sentencing phases of the original trial.

History. Acts 1983, No. 546, § 1;
A.S.A. 1947, § 41-1358.

CASE NOTES

ANALYSIS

Constitutionality.

Construction with other laws.

Applicability.

Evidence.

Place of resentencing.

Constitutionality.

Section is not unconstitutional, since state may not seek any greater penalty or punishment against defendant for crime he committed than that which was available under prior law. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, cert. denied, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

The retroactive application provision of this section does not violate the ex post facto clause. *Ruiz v. Norris*, 868 F. Supp.

1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Construction With Other Laws.

There is no direct conflict between Rule of Evidence 804(b)(1) and subdivision (a)(4) of this section, as this section is limited specifically to resentencing in criminal trials and the rule of evidence applies to all proceedings whether civil or criminal; thus, in a resentencing hearing in a murder prosecution, the trial court properly allowed the use of testimony from a prior sentencing hearing without evidence of unavailability. *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001), cert. denied, 534 U.S. 858, 122 S. Ct. 135, 151 L. Ed. 2d 88 (2001).

Applicability.

When there is no error other than in the sentencing phase of the trial, it is appropriate to follow this section, vacating the sentence of death and remanding the case to the trial court. *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734, modified, 295 Ark. 692A, 752 S.W.2d 762 (1988).

Prior to the enactment of this section, upon a finding of reversible error at the sentencing phase, defendants would have been retried on both guilt and penalty issues. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Evidence.

State should not be precluded from introducing additional relevant evidence on remand at a resentencing trial, especially when defendant's guilt already has been established and when defendant has not shown or demonstrated prejudice that would result from the admission of such evidence. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, *cert. denied*, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Subdivision (a)(4) of this section provides that relevant evidence from the prior trial may be admitted without any further foundation. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

Place of Resentencing.

This section requires that following remand after vacation of his death sentence, the resentencing was to be conducted in the county where the defendant was originally tried, found guilty and sentenced, even though the murder took place in another county. *Pickens v. Circuit Court*, 283 Ark. 97, 671 S.W.2d 163 (1984).

This section is not local or special law changing the venue in criminal cases; this section did not fix venue, but merely reinvested venue for resentencing purposes in county parties agreed on. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230, *cert. denied*, 484 U.S. 917, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Motion for change of venue at resentencing denied where defendant did not demonstrate sufficient prejudice and had waived any objection after concurring in the makeup of the jury. *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998), *cert. denied*, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Cited: *Pickens v. Lockhart*, 802 F. Supp. 208 (E.D. Ark. 1992), *aff'd*, 4 F.3d 1446 (8th Cir. 1993), *cert. denied*, 510 U.S. 1170, 114 S. Ct. 1206, 127 L. Ed. 2d 553 (1994); *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994); *Willetts v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995); *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997); *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997); *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

5-4-617. Method of execution.

(a)(1) The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

(2) The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution.

(b) If the execution of the sentence of death as provided in subsection (a) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution in a manner determined by the director.

(c) Nothing in this section shall be construed as a declaration by the General Assembly that death by electrocution constitutes cruel and

unusual punishment in violation of the United States Constitution or the Arkansas Constitution.

History. Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357.

Publisher's Notes. Acts 1983, No. 774, § 2, provided that the act applied only to capital offenses committed after July 4, 1983, and that nothing in the act was to be construed to alter the execution of a sentence of death imposed for crimes committed prior to July 4, 1983, except as provided in § 3 of the act.

Acts 1983, No. 774, § 3, provided that

any defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection and that the election must be exercised in writing one (1) week prior to the date of execution or it would be deemed waived.

Acts 1983, No. 774, § 4, provided that all references in the laws to execution by electrocution should mean execution by lethal injection except as to capital offenses already committed.

CASE NOTES

ANALYSIS

Cruel and unusual punishment.
Pronouncement of death.

Cruel and Unusual Punishment.

Although the trial court refused to grant a continuance at the penalty phase because it considered testimony to be offered about the effects of electrocution on the human body to be inadmissible as mitigating evidence, the judge stating that a determination as to whether electrocution constituted cruel and unusual punishment was a question of law, not of fact, and thus was outside the province of the jury, the argument has since been mooted by the fact that the General Assembly has changed the method of execution from electrocution to lethal injection. This change would permit one now to elect either of these methods by which to die, so even if there were error in the exclusion of the testimony, a convicted person suffered

no actual harm in the jury's not being apprised of the pain and suffering incurred during an electrocution, for he need not choose that method of execution. *Swindler v. Lockhart*, 693 F. Supp. 760 (E.D. Ark. 1988), *aff'd*, 885 F.2d 1342 (8th Cir. 1989), *cert. denied*, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

Pronouncement of Death.

The death of a person who has been executed must be pronounced according to accepted standards of medical practice. *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992).

An execution ends with the pronouncement of death by someone qualified to determine the absence of vital signs, and this section does not require that this determination be made by a medical doctor. *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992).

Cited: *Fairchild v. State*, 286 Ark. 191, 690 S.W.2d 355 (1985).

5-4-618. Mental retardation.

(a)(1) As used in this section, "mental retardation" means:

(A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and

(B) A deficit in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

(d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial.

(2)(A) Prior to trial, the court shall determine if the defendant has mental retardation.

(B)(i) If the court determines that the defendant does not have mental retardation, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial.

(ii) At the time the jury retires to decide mitigating and aggravating circumstances, the jury shall be given a special verdict form on mental retardation.

(iii) If the jury unanimously determines that the defendant had mental retardation at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.

(C) If the court determines that the defendant has mental retardation, then:

(i) The jury is not "death qualified"; and

(ii) The jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.

(e) However, this section is not deemed to:

(1) Require unanimity for consideration of any mitigating circumstance; or

(2) Supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.

History. Acts 1993, No. 420, § 1.

A.C.R.C. Notes. *References to "this chapter" in subchapters 1-5 and §§ 5-4-601 — 5-4-617 may not apply to this section which was enacted subsequently.

References to "this subchapter" in §§ 5-4-601 — 5-4-617 may not apply to this section which was enacted subsequently.

CASE NOTES

ANALYSIS

Applicability.

Appellate review.

Determinative factors.

Rebuttable presumption.

Applicability.

Where there had previously been a judicial determination that defendant was not mentally retarded, this section did not apply. *Fairchild v. Norris*, 314 Ark. 221, 861 S.W.2d 111 (1993).

Where the question of defendant's mental retardation was addressed and resolved by the federal courts before this section's prohibition was enacted, the

mere passage of Acts 1993, No. 420 does not require a new resolution of this issue. *Fairchild v. Norris*, 317 Ark. 166, 876 S.W.2d 588, cert. denied, 513 U.S. 974, 115 S. Ct. 448, 130 L. Ed. 2d 357 (1994).

Appellate Review.

The standard for reviewing a trial court's determination that a defendant is not mentally retarded under this section will be affirmed if it is supported by substantial evidence. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

In a criminal prosecution for capital murder, where the circuit court determined that defendant was not mentally retarded, he was permitted to raise the

question of mental retardation to the jury for determination de novo during the sentencing phase of the trial, pursuant to subdivision (d)(2)(A) of this section. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Petitioner's claim that he was unable to raise the defense that he was mentally retarded and that his execution violated U.S. Const. amend. VIII in state court prior to the United States Supreme Court's decision that the execution of mentally retarded individuals violated the Eighth Amendment's prohibition on cruel and unusual punishment was meritless because petitioner failed to avail himself of subsection (b) of this section, which prohibited the execution of defendants with mental retardation and which satisfied the Eighth Amendment. *Engram v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 788 (Dec. 16, 2004), cert. denied, — U.S. —, 125 S. Ct. 2965, 162 L. Ed. 2d 893 (2005).

Determinative Factors.

Although a defendant is entitled under subdivision (a)(2) to a rebuttable presumption of mental retardation if his intelligence quotient (I.Q.) is 65 or below, the definition of "mental retardation" encompasses more than an I.Q. score. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Rebuttable Presumption.

Scores of 66 and 72 on two I.Q. tests did not entitle defendant to the rebuttable

presumption under subdivision (a)(2). *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Murder defendant's motion to recall mandate and reopen his case was denied as defendant should have obtained a ruling on his retardation issue before trial; defendant failed to file a motion under subsection (b) of this section, which prevented a mentally retarded defendant from being sentenced to death, or to request a ruling on the retardation issue, and, at a competency hearing, a forensic psychologist for the state concluded defendant was not retarded. *Engram v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 788 (Dec. 16, 2004), cert. denied, — U.S. —, 125 S. Ct. 2965, 162 L. Ed. 2d 893 (2005).

Where a forensic psychologist testified that defendant's IQ score would likely fall between the scores of 76 and 86, defendant was not entitled to the rebuttable presumption of mental retardation under subdivision (a)(2) of this section and, thus, the trial court had no duty to raise sua sponte the issue of whether defendant was not eligible for the death penalty. *Engram v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 788 (Dec. 16, 2004), cert. denied, — U.S. —, 125 S. Ct. 2965, 162 L. Ed. 2d 893 (2005).

Cited: *Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995); *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000); *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

SUBCHAPTER 7 — ENHANCED PENALTIES FOR CERTAIN OFFENSES

SECTION.

5-4-701. Definitions.

5-4-702. Enhanced penalties for offenses

committed in presence of a child.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-5 and §§ 5-4-601 — 5-4-617 may not apply to this

subchapter which was enacted subsequently.

5-4-701. Definitions.

As used in this subchapter:

- (1) "Child" means a person under sixteen (16) years of age; and
- (2) "In the presence of a child" means in the physical presence of a child or knowing or having reason to know that a child is present and

may see or hear an act of assault, battery, domestic battering, or assault on a family member or household member.

History. Acts 2001, No. 1707, § 1; substituted “domestic battering” for “domestic battery” in (2).
2005, No. 1994, § 290.

Amendments. The 2005 amendment

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-4-702. Enhanced penalties for offenses committed in presence of a child.

(a) Any person who commits a felony offense involving assault, battery, domestic battering, or assault on a family member or household member, as provided in § 5-13-201 et seq. or § 5-26-303 — 5-26-311, may be subject to an enhanced sentence of an additional term of imprisonment of not less than one (1) year and not greater than ten (10) years if the offense is committed in the presence of a child.

(b)(1) To seek an enhanced penalty established in this section, a prosecuting attorney shall notify the defendant in writing that the defendant is subject to the enhanced penalty.

(2) If the defendant is charged by information or indictment, the prosecuting attorney may include the written notice in the information or indictment.

(c) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(d) Any person convicted under this section is not eligible for early release on parole⁵ for the enhanced portion of the sentence.

History. Acts 2001, No. 1707, § 2.

CHAPTER 5

DISPOSITION OF CONTRABAND AND SEIZED PROPERTY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES.
3. FORFEITURE OF PROPERTY DUE TO THEFT OF LIVESTOCK.
4. FORFEITURE OF WEAPONS AND AMMUNITION.

RESEARCH REFERENCES

ALR. Forfeiture of money to state or with or proximity to other contraband. 38
local authorities based on its association ALR 4th 496.

Necessity of conviction of offense associated with property seized to support forfeiture. 38 ALR 4th 515.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-5-101. Disposition of contraband and seized property.

SECTION.

5-5-102. Effect of noncode statutes.

Cross References. Disarming of minors and mentally defective or irresponsible persons, disposition of property, § 5-73-110.

Property subject to forfeiture, § 5-64-505.

5-5-101. Disposition of contraband and seized property.

(a) Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.

(b) "Contraband" includes any:

(1) Article possessed under a circumstance prohibited by law;

(2) Weapon or other instrumentality used in the commission or attempted commission of a felony; and

(3) Other article designated "contraband" by law.

(c)(1) Contraband shall be destroyed.

(2) However, in the discretion of the court having jurisdiction, any contraband capable of lawful use may be:

(A) Retained for use by the law enforcement agency responsible for the arrest; or

(B) Sold and the proceeds disposed of in the manner provided by subsections (e)-(g) of this section.

(d)(1) Unclaimed seized property shall be sold at public auction to be held by the chief law enforcement officer of the county, city, or town law enforcement agency that seized the unclaimed seized property or the chief law enforcement officer's designee.

(2) The proceeds of the sale, less the cost of the sale and any storage charge incurred in preserving the unclaimed seized property, shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

(e) The time and place of sale of seized property shall be advertised:

(1) For at least fourteen (14) days next before the day of sale by posting written notice at the courthouse door; and

(2) By publication in the form of at least two (2) insertions, at least three (3) days apart, before the day of sale in a weekly or daily newspaper published or customarily distributed in the county.

(f)(1) Any seized property to be sold at public sale shall be offered for sale on the day for which it was advertised between 9:00 a.m. and 3:00 p.m., publicly, by auction, and for ready money.

(2) The highest bidder shall be the purchaser.

(g)(1) The proceeds from any sale of seized property shall be delivered to the county, city, or town treasurer, as the case may be, to be held by him or her in a separate account for a period of three (3) months.

(2) If any person during the time described in subdivision (g)(1) of this section establishes to the satisfaction of the county, city, or town treasurer that he or she was at the time of sale the owner of any seized property sold as provided in subsection (f) of this section, the person shall be paid the amount realized from sale of the seized property less the expenses of the sale.

(3) Any money in the separate account not claimed or paid within the designated three-month period shall be paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.

History. Acts 1975, No. 280, § 1401; 1977, No. 360, § 4; A.S.A. 1947, § 41-1401; Acts 1991, No. 1030, § 1; 2003, No. 135, § 1.

Amendments. The 2003 amendment substituted “chief law enforcement officer ... officer’s designee” for “sheriff of the county in which the seizure took place” in

(d); added “city, or town whose law enforcement agency performed the seizure” in (d) and (g); and, in (g), substituted “county, city, or town treasurer, as the case may be” for “county treasurer” and “provided in subsection (f) of this section” for “above provided” and made minor stylistic and gender neutral changes.

CASE NOTES

ANALYSIS

Construction.

Mistake of law defense.

Possessed under circumstances prohibited by law.

Construction.

There is no conflict between this section and ARCrP, Rule 15(f), and the latter is simply the procedural implementation of the former. *Wilburn v. Topeka Corp.*, 265 Ark. 141, 577 S.W.2d 406 (1979).

Mistake of Law Defense.

Where defendant was charged with possession of gambling devices and a jury found him not guilty by mistake of law due to his reliance upon inapplicable law in operating his arcade business, defen-

dant’s assertion of the defense was an admission that he had engaged in illegal conduct and, because the jury found defendant’s machines were illegal, the trial court did not err in ordering the machines forfeited and destroyed. *Mullins v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 727 (Nov. 18, 2004).

Possessed Under Circumstances Prohibited by Law.

Currency being held in the hand or pocket while waiting to make a future bet was not “possessed under circumstances prohibited by law” within the meaning of this section. *Henry v. State*, 280 Ark. 24, 655 S.W.2d 372 (1983).

Cited: *Anderson v. Sharp County*, 295 Ark. 366, 749 S.W.2d 306 (1988).

5-5-102. Effect of noncode statutes.

When a statute not a part of the Arkansas Criminal Code specifies a procedure for the disposition or destruction of a particular type of seized

property, the seized property shall be disposed of or destroyed in accordance with that statute.

History. Acts 1975, No. 280, § 1402; A.S.A. 1947, § 41-1402.

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

SUBCHAPTER 2 — FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES

SECTION.

5-5-201. Forfeiture requirement — Exceptions.

5-5-202. Seizure of conveyances.

5-5-203. Control of seized conveyances.

SECTION.

5-5-204. Use or sale of conveyances — Disposition of sale proceeds.

Effective Dates. Acts 1985, No. 238, § 6: Mar. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law does not adequately deter burglaries, robberies, thefts or arsons; that to provide for the forfeiture of vehicles, vessels or aircraft used in the commission of those crimes would be an additional deterrent to the commission of those crimes; that this

Act provides for such forfeiture and should be given immediate effect in order to help deter burglaries, robberies, thefts and arsons. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-5-201. Forfeiture requirement — Exceptions.

(a) Upon conviction, any conveyance, including an aircraft, motor vehicle, or vessel, that is used in the commission of a burglary, robbery, theft, or arson, or an attempt to commit a burglary, robbery, theft, or arson, is subject subject to forfeiture as provided in this subchapter.

(b) However:

(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this subchapter unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to the commission or attempt to commit the offense;

(2) No conveyance is subject to forfeiture under this subchapter by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent and without the knowledge or consent of any person having possession, care, or control of the conveyance with the owner's permission; and

(3) A forfeiture of a conveyance encumbered by a security interest is subject to the security interest of the secured party if the secured party neither had knowledge of nor consented to the use of the conveyance in the commission or attempt to commit the offense.

History. Acts 1985, No. 238, § 1;
A.S.A. 1947, § 41-1403.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

5-5-202. Seizure of conveyances.

(a) A conveyance subject to forfeiture under this subchapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the conveyance upon a petition filed by the prosecuting attorney of the judicial district.

(b) Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant; or

(2) Any law enforcement agent has probable cause to believe that the conveyance was used in the commission of a burglary, robbery, theft, or arson, or an attempt to commit a burglary, robbery, theft, or arson.

History. Acts 1985, No. 238, § 2;
A.S.A. 1947, § 41-1404.

5-5-203. Control of seized conveyances.

(a) When a conveyance is seized under this subchapter, the conveyance shall remain in the custody of the seizing law enforcement agency.

(b)(1) The conveyance is not subject to replevin.

(2) However, the conveyance is subject only to an order or decree of the circuit court having jurisdiction over the conveyance.

History. Acts 1985, No. 238, § 3;
A.S.A. 1947, § 41-1405.

5-5-204. Use or sale of conveyances — Disposition of sale proceeds.

(a) Upon conviction, when the circuit court having jurisdiction over the conveyance seized finds upon a hearing by a preponderance of the evidence that a ground for a forfeiture exists under this subchapter, the circuit court shall enter an order to:

(1) Permit the law enforcement agency or the prosecuting attorney for the judicial district in which the conveyance was seized to retain the conveyance for official use; or

(2)(A) Permit the law enforcement agency to sell the conveyance at a public or private sale.

(B) In the event of a sale, the circuit court shall provide by order that the proceeds be used for payment of any proper expense of the proceeding for forfeiture and sale, including expenses of:

(i) Investigation;

(ii) Seizure;

- (iii) Maintenance of custody;
- (iv) Advertising; and
- (v) Court costs.

(b) Any proceeds from the sale of a forfeited conveyance under this subchapter in excess of a proper expense shall be distributed as follows:

(1) Forty percent (40%) to be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund;

(2)(A) Forty percent (40%) to the law enforcement agency that perfected the arrest.

(B) However, if a federal agency perfected the arrest the forty percent (40%) under subdivision (b)(2)(A) of this section shall be distributed to the county sheriff's office of the county responsible for the prosecution; and

(3) Twenty percent (20%) to the county sheriff's office of the county responsible for the prosecution.

History. Acts 1985, No. 238, § 4;
A.S.A. 1947, § 41-1406.

SUBCHAPTER 3 — FORFEITURE OF PROPERTY DUE TO THEFT OF LIVESTOCK

SECTION.

5-5-301. Definitions.

5-5-302. Property subject to forfeiture.

5-5-303. Petition for forfeiture — Order.

5-5-304. Disposition of forfeited property.

SECTION.

5-5-305. Disposition of proceeds.

5-5-306. When more than one agency involved.

5-5-301. Definitions.

As used in this subchapter:

(1)(A) "Contraband property" means property of any nature, including personal property, tangible property, or intangible property.

(B) "Contraband property" does not include real property;

(2) "Livestock" means:

(A) Cattle or swine or a sheep, goat, horse, or mule; and

(B) Any carcass, skin, or part of cattle or swine or a sheep, goat, horse, or mule; and

(3) "Theft of livestock" means a theft of property:

(A) That is classified as a felony violation pursuant to § 5-36-103; and

(B) In which the property taken was livestock.

History. Acts 1993, No. 1031, § 1.

5-5-302. Property subject to forfeiture.

(a) The following property is subject to forfeiture pursuant to this subchapter:

(1) Contraband property used or intended to be used in the commission of theft of livestock;

(2) The proceeds gained from the commission of theft of livestock;

(3) Personal property acquired with proceeds gained from the commission of theft of livestock;

(4)(A) Any conveyance, including an aircraft, vessel, vehicle, or horse that is used or intended for use to transport or in any manner to facilitate the transportation for the purpose of the commission of theft of livestock.

(B) No conveyance used by any person as a common carrier in the transportation of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this subchapter.

(C) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without the owner's knowledge or consent.

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the bona fide security interest of the secured party;

(5) Any book, record, or research product or material including microfilm, tape, or data that is used or intended for use in the theft of livestock; and

(6)(A)(i) Anything of value furnished or intended to be furnished or traded or used as payment or invested for anything of value in return for the commission of the theft of livestock.

(ii) However, subdivision (a)(6)(A)(i) of this section does not include real property.

(B) It may be presumed that property described in subdivision (a)(6)(A)(i) of this section was acquired with proceeds gained from the commission of theft of livestock and is subject to forfeiture.

(b) Property that is used in the commission of theft of livestock that has title of ownership with two (2) parties on the title or a cosigner is subject to forfeiture if one (1) party on the title uses the property in the commission of theft of livestock or receives titled property as the proceeds of the commission of theft of livestock, even if the second party claims that he or she did not have knowledge or involvement in the commission of theft of livestock.

(c)(1) Any money, coin, or currency found in possession of a person arrested for the theft of livestock or found in, on, or in close proximity to any forfeited property used or intended for the use in the theft of livestock is presumed to be forfeitable under this section.

(2) The burden of proof is upon a claimant of property described in subdivision (c)(1) of this section to rebut the presumption under subdivision (c)(1) of this section.

5-5-303. Petition for forfeiture — Order.

(a)(1) The prosecuting attorney of the judicial district within whose jurisdiction there is property that is sought to be forfeited pursuant to § 5-5-302 shall promptly proceed against the property by filing in the circuit court having jurisdiction of the property a petition for an order to show cause why the circuit court should not order forfeiture of the property.

(2) The petition shall be verified and shall set forth:

(A) A statement that the action is brought pursuant to § 5-5-302;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain the property was used or intended to be used in a criminal act constituting theft of livestock or that a criminal act constituting theft of livestock took place in, upon, or by means of the property;

(E) A statement detailing the facts in support of subsection (a) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(b)(1) Upon receipt of a petition complying with the requirements of subsection (a) of this section, the circuit judge of the court having jurisdiction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) In addition, the order shall set a date at least forty-one (41) days from the date of first publication of the order pursuant to subsection (c) of this section for any person claiming an interest in the property to file such pleadings as the person desires as to why the circuit court should not order the forfeiture of the property to use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the property.

(c)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing to be published a copy of the order to show cause two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to any person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure, if:

(i) The property is of a type for which title or registration is required by law;

(ii) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(iii) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The law enforcement agency is obligated only to make diligent search and inquiry as to the owner of the property and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.

(d) At the hearing on the matter, the petitioner has the burden to establish that the property is subject to forfeiture as provided in § 5-5-302.

(e) The final order of forfeiture by the circuit court perfects in the law enforcement agency right, title, and interest in and to the property and relates back to the date of the seizure.

(f) Physical seizure of property is not necessary in order to allege in a petition under this section that property is forfeitable.

(g) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective order as is necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

History. Acts 1993, No. 1031, § 3.

5-5-304. Disposition of forfeited property.

(a) Subject to the provisions of subsection (c) of this section, if property forfeited pursuant to § 5-5-302 is harmful to the public health or is required by law to be destroyed, the law enforcement agency to which the property is forfeited shall:

(1) Require the sheriff of the county to take custody of the property and remove it to any appropriate location for disposition in accordance with law; or

(2) Forward the property to the Department of Arkansas State Police for disposition.

(b) Subject to the provisions of subsection (c) of this section, if property forfeited pursuant to § 5-5-302 is not harmful to the public health and is not required by law to be destroyed, the law enforcement agency to which the property is forfeited shall:

(1) Sell the property in accordance with subsection (d) of this section; or

(2) Retain the property for official use if the property is not subject to a lien that has been preserved by the circuit court.

(c) If the property is a controlled substance, the law enforcement agency to which the property is forfeited shall transfer it to the Drug Enforcement Administration of the United States Department of Justice or the Division of Health of the Department of Health and Human Services for disposition or destruction.

(d)(1) If a law enforcement agency desires to sell property forfeited to it pursuant to § 5-5-302, the law enforcement agency shall first cause

notice of the sale to be made by publication at least two (2) times a week for two (2) consecutive weeks in a newspaper having general circulation in the county and sending a copy of the notice of the sale by certified mail, return receipt requested, to any person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure, if:

(A) The property is of a type for which title or registration is required by law;

(B) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(C) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The notice of the sale shall include the time, place, and conditions of the sale and a description of the property to be sold.

(3) The property shall then be disposed of at public auction to the highest bidder for cash without appraisal.

History. Acts 1993, No. 1031, § 4.

5-5-305. Disposition of proceeds.

(a) The proceeds of any sale pursuant to § 5-5-304 and any moneys forfeited pursuant to § 5-5-302 shall be applied to payment of the:

(1) Balance due on any lien preserved by the circuit court in the forfeiture proceeding;

(2) Cost incurred by the seizing law enforcement agency in connection with the storage, maintenance, security, and forfeiture of the property;

(3) Cost incurred by the prosecuting attorney or attorney for the law enforcement agency approved by the prosecuting attorney to which the property is forfeited; and

(4) Cost incurred by the circuit court.

(b) The remaining proceeds or moneys shall be disposed of as follows:

(1) If the law enforcement agency is a state agency, the entire amount shall be deposited into the State Treasury into the fund for that state agency for the law enforcement purposes for that state agency; and

(2)(A) If the law enforcement agency is a:

(i) County sheriff's office, the entire amount shall be deposited into the county treasury and credited to a special law enforcement forfeiture fund in the county treasury; or

(ii) City or town police agency, the entire amount shall be deposited into the city or town treasury and credited to a special law enforcement forfeiture fund in the city or town treasury.

(B) Moneys in the special law enforcement forfeiture fund in the county, city, or town treasury shall be expended only upon appropriation to the county sheriff's office or to the city or town police agency by the county quorum court or governing body of the city or town:

(i) To defray the cost of a protracted investigation;

- (ii) To provide additional technical equipment or expertise;
 - (iii) To provide matching funds to obtain a federal grant; or
 - (iv) For such other law enforcement purposes as the county quorum court or governing body of the city or town deems appropriate.
- (C) Moneys in the special law enforcement forfeiture fund in the county, city, or town treasury shall not be considered a source of revenue to meet a normal operating expense.

History. Acts 1993, No. 1031, § 5.

5-5-306. When more than one agency involved.

(a) If more than one (1) law enforcement agency is substantially involved in effecting a forfeiture pursuant to § 5-5-302, the circuit court having jurisdiction over the forfeiture proceeding shall equitably distribute the property among the law enforcement agencies.

(b) Any forfeited money or any proceeds remaining after the sale of the property shall be equitably distributed:

(1) To the county, city, or town for deposit in the respective county, city, or town treasury and credited to the special law enforcement forfeiture fund provided in § 5-5-305; and

(2) In the manner as provided in § 5-5-305.

History. Acts 1993, No. 1031, § 6.

SUBCHAPTER 4 — FORFEITURE OF WEAPONS AND AMMUNITION

SECTION.

5-5-401. Definitions.

5-5-402. Transfer to State Crime Laboratory.

5-5-403. Authority of State Crime Laboratory to receive.

SECTION.

5-5-404. Receipts.

5-5-405. Destruction.

Cross References. State Crime Laboratory, § 12-12-301 et seq.

Effective Dates. Acts 1995, No. 202, § 5: Feb. 9, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that there exists a shortage of test weapons and ammunition to be used by the State Crime Lab for use in solving crime; that the shortage extends to type and caliber of weapons and ammunition not currently available to the State Crime Lab; that the State Crime Lab is in need of weapons for testing purposes; that crimes involving weap-

ons are increasing in occurrence and violence; that the diversity of weapons used in the commission of crimes is significantly greater than the current inventory of test weapons and ammunition. Therefore, in order to enable the Crime Lab to fully assist law enforcement in solving crime, proving evidence, and training of firearms and weapons experts, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

C.J.S. 28A C.J.S., Drugs & N, § 134 et seq.

37 C.J.S., Forf., §§ 3, 4.
94 C.J.S. Weapons, § 51.

5-5-401. Definitions.

As used in this subchapter:

(1) "State Crime Laboratory" means the State Crime Laboratory established in § 12-12-301 et seq; and

(2) "Weapon" means any firearm, bomb, explosive, metal knuckles, sword, spear, or other device employed as an instrument of crime by subjecting another to physical harm or fear of physical harm.

History. Acts 1995, No. 202, § 1.

5-5-402. Transfer to State Crime Laboratory.

(a)(1) Notwithstanding any other provision of this chapter, a weapon or ammunition seized by any agency of the State of Arkansas or any local law enforcement agency in the state, and that is forfeited pursuant to law, may be transferred to the State Crime Laboratory.

(2) However, no transfer of a weapon shall be made pursuant to this section until there is a final determination concerning the disposition of the weapon or ammunition by the court having jurisdiction over the weapon or ammunition.

(b) In addition to a forfeited weapon or ammunition, any other weapon or ammunition held by an agency of the state or a local law enforcement agency for which the agency has no use may be transferred to the laboratory under the procedures prescribed in this subchapter.

(c) Nothing contained in this subchapter shall be construed to preclude a voluntary transfer to the State Crime Laboratory by an individual, entity, or agency of the United States Government.

History. Acts 1995, No. 202, § 1.

Cross References. Testing by State Crime Laboratory, § 12-12-324.

5-5-403. Authority of State Crime Laboratory to receive.

The State Crime Laboratory may:

(1) Receive a weapon or ammunition pursuant to this subchapter; and

(2) Use a weapon or ammunition received pursuant to this subchapter for:

(A) Testing;

(B) Training;

(C) Data compilation; or

(D) Such other appropriate purposes as are determined by the Executive Director of the State Crime Laboratory.

History. Acts 1995, No. 202, § 1.

Cross References. Testing by State Crime Laboratory, § 12-12-324.

5-5-404. Receipts.

(a)(1) When any weapon or ammunition is transferred and delivered to the State Crime Laboratory, the laboratory shall provide a receipt to be signed by the transferor or donor and the laboratory officer or employee accepting the weapon or ammunition.

(2) The receipt shall contain the following information:

- (A) A list of any weapon by type, make, and caliber;
- (B) The serial number of a weapon, when available;
- (C) The case number of the case in which the weapon was involved, when available; and
- (D) The type, caliber, and make of the ammunition, when available.

(b) A copy of the receipt shall be retained by the laboratory and a copy of the receipt shall be delivered to the agency, individual, or other entity transferring or donating a weapon or ammunition.

History. Acts 1995, No. 202, § 1.

5-5-405. Destruction.

When the Executive Director of the State Crime Laboratory determines that any weapon or ammunition transferred or donated pursuant to a provision of this subchapter is no longer useful to the State Crime Laboratory, the weapon, piece of weapon, or ammunition shall be destroyed.

History. Acts 1995, No. 202, § 1.

CHAPTERS 6-9

[Reserved]

SUBTITLE 2. OFFENSES AGAINST THE PERSON

CHAPTER 10

HOMICIDE

SECTION.

5-10-101. Capital murder.

5-10-102. Murder in the first degree.

5-10-103. Murder in the second degree.

SECTION.

5-10-104. Manslaughter.

5-10-105. Negligent homicide.

5-10-106. Physician-assisted suicide.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1987 (1st Ex.

Sess.), No. 52, § 2: June 29, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in the case of *Ronnie Midgett, Sr. vs. State of Arkansas*, CR 86-215, the Supreme Court of the State of Arkansas failed to find evidence of premeditation and deliberation in order to affirm a jury finding of first degree murder where a child's death was caused from a beating at the hands of his drunken father, and therefore reduced the father's conviction to second degree murder causing considerable confusion with reference to the application of Arkansas' first degree murder statute to child abuse cases resulting in death, the immediate passage of this Act is necessary in order to clearly establish Arkansas' first degree murder statute to be applicable in such cases. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the pres-

ervation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Criminal liability for injury or death caused by operation of pleasure boat. 8 ALR 4th 886.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR 4th 960.

Criminal responsibility. 9 ALR 4th 526.

Felony-murder doctrine: judicial abrogation of. 13 ALR 4th 1226.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR 4th 983.

Malice "aforethought," "deliberation," or "premeditation" as elements of murder in the first degree. 18 ALR 4th 961.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 ALR 4th 1153.

Skeletal remains: admissibility of expert or opinion testimony concerning identification. 18 ALR 4th 1294.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter. 19 ALR 4th 861.

Statute defining homicide by conduct manifesting "depraved indifference". 25 ALR 4th 311.

Homicide as precluding taking under will or by intestacy. 25 ALR 4th 787.

Sufficiency of evidence of mother's ne-

glect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide. 40 ALR 4th 724.

Homicide by causing brain-dead condition of victim. 42 ALR 4th 742.

Corporation's criminal liability for homicide. 45 ALR 4th 1021.

Withdrawal of life supports from comatose patient. 47 ALR 4th 18.

Am. Jur. 40 Am. Jur. 2d, Homicide, § 1 et seq.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

Manslaughter: The Resting Place of Several Former Statutes, 30 Ark. L. Rev. 213.

The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

Note, Grigsby v. Mabry: Convictions Rendered by Death-Qualified Juries Are Unconstitutional, 39 Ark. L. Rev. 335.

C.J.S. 40 C.J.S., Homicide, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Survey of Arkansas Law: Criminal Procedure, 6 UALR L.J. 119.

Survey — Criminal Law, 11 UALR L.J. 175.

Survey, Criminal Law, 12 UALR L.J. 617.

Survey, Criminal Law, 13 UALR L.J. 341.

CASE NOTES

Constitutionality.

This chapter and § 5-4-602 are not unconstitutionally ambiguous, overbroad or vague, either facially or as applied. *Ruiz v.*

Norris, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir. 1995), *cert. denied*, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit:

(i) Terrorism, as defined in § 5-54-205;

(ii) Rape, § 5-14-103;

(iii) Kidnapping, § 5-11-102;

(iv) Vehicular piracy, § 5-11-105;

(v) Robbery;

(vi) Burglary, § 5-39-201;

(vii) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 — 5-64-608, involving an actual delivery of a controlled substance; or

(viii) First degree escape, § 5-54-110; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life;

(2) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit arson, § 5-38-301; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person;

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, any military personnel, or teacher or school employee, when such person is acting in the line of duty, the person causes the death of any person;

(4) With the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person;

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, the person causes the death of any person;

(6) While incarcerated in the Department of Correction or the Department of Community Correction, the person purposely causes the death of another person after premeditation and deliberation;

(7) Pursuant to an agreement that the person cause the death of another person in return for anything of value, he or she causes the death of any person;

(8) The person enters into an agreement in which one (1) person is to cause the death of another person in return for anything of value, and the person hired pursuant to the agreement causes the death of any person;

(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

(B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member; or

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.

(c)(1) Capital murder is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.

(2) For any purpose other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-308, 5-4-310, 5-4-311, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, and 5-4-608, capital murder is a Class Y felony.

History. Acts 1975, No. 280, § 1501; 1983, No. 341, § 1; 1985, No. 840, § 1; A.S.A. 1947, § 41-1501; Acts 1987, No. 242, § 2; 1989, No. 97, § 1; 1989, No. 856, § 1; 1991, No. 683, § 1; 1993, No. 1189, § 2; 1995, No. 258, § 1; 1995, No. 800, § 1; 2003, No. 1342, § 5.

A.C.R.C. Notes. Acts 1993, No. 1189, § 1, provided: "(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by

school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is increasing.

"(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees."

Regarding the reference to "robbery" in

subdivision (a)(1)(A)(v) of this section, the offense of robbery is codified at § 5-12-102. However, the Arkansas Supreme Court has construed that reference to “robbery” to also include “aggravated robbery”, which is codified at § 5-12-103. See e.g. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Regarding the reference to the “Uniform Controlled Substances Act, §§ 5-64-

101 — 5-65-608” in subdivision (a)(1)(A)(vii) of this section, the following sections within that reference have been repealed: §§ 5-64-409, 5-64-416, 5-64-509, and 5-64-601 — 5-64-608.

Amendments. The 2003 amendment made gender neutral and stylistic changes throughout; and in (a)(1), added “terrorism, as defined in § 5-54-205”.

Cross References. Conduct constituting more than one offense, § 5-1-110.

RESEARCH REFERENCES

ALR. Propriety of lesser included offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases. 3 A.L.R.6th 543.

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

Survey — Criminal Law, 14 UALR L.J. 753.

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CASE NOTES

ANALYSIS

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— In general.

The capital felony murder statute is not unconstitutional. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), cert. denied, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995); *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000).

The fact that the jury must find the existence of robbery in order to convict of capital felony murder committed in the course of a robbery and then may also consider the motive of robbery as an aggravating circumstance under § 5-4-604(6) concerning “pecuniary gain” does not render the jury’s discretion unfettered or unconstitutionally arbitrary; rather, the jury’s attention is directed to the specific circumstances of the crime. *Woodard v. Sargent*, 567 F. Supp. 1548 (E.D. Ark. 1983), rev’d on other grounds, 753 F.2d 694 (8th Cir. 1985), vacated and remanded, 476 U.S. 1112, 106 S. Ct. 1964, 90 L. Ed. 2d 650 (1986).

The capital felony murder statute, and the first-degree murder statute, are not void for vagueness because they overlap. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983); *Owens v. State*, 283 Ark. 327, 675 S.W.2d 834 (1984).

Argument of defendant that the Arkansas death penalty was unconstitutional was rejected. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Capital murder and first-degree murder statutes are constitutional. *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 688 (1983).

The claim that the Arkansas statutory scheme regarding capital murder is unconstitutional in that it does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, was rejected upon the evidence presented. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269 (1991).

Even though the state may charge a murder during the course of a felony as either capital or first-degree murder, there is no violation of defendant's right to equal protection. *Penn v. State*, 284 Ark. 234, 681 S.W.2d 307 (1984).

The overlap of subdivision (a)(1) of this section with § 5-10-102(a)(1) does not deprive the accused of due process and equal protection of the laws. *Cannon v. State*, 286 Ark. 242, 690 S.W.2d 725 (1985).

The Supreme Court has held consistently that the death penalty as provided for by this section is constitutional. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

Both this section and the murder in the first degree statute, § 5-10-102, clearly identify the conduct prohibited and unambiguously describe the applicable penalties, thus providing adequate notice; therefore, these sections are not unconstitutionally vague. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), reinstated on reh'g, 915 F.2d 372 (8th Cir. 1990).

The removal for cause, prior to the guilt

phase of a bifurcated capital trial, of prospective jurors who state that they cannot, under any circumstances, vote for the imposition of the death penalty does not violate a defendant's right under the Sixth and Fourteenth Amendments of the United States Constitution to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community or his constitutional right to an impartial jury. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

It is not unconstitutional to seek the death penalty when a black defendant is tried for the murder of a white victim. *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988).

The Arkansas capital punishment procedure under this section and § 5-4-601 et seq. appropriately narrows the class of death eligible persons and is constitutional. *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

The homicide statutes' 1989 revisions, which upgraded "premeditated and deliberated" murder from first-degree murder to capital murder, did not violate the constitutional prohibition against sentencing guidelines that fail to sufficiently narrow jury discretion in death penalty cases, because under Arkansas' revised capital sentencing scheme, § 5-4-604, the constitutionally-required narrowing function is provided by the "aggravating circumstance" requirement at the penalty phase. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

The elements of "premeditated and deliberated" capital murder under subdivision (a)(4) of this section, and the elements of "purposeful" first-degree murder under subdivision (a)(2) of this section do not unconstitutionally or impermissibly overlap. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

While that class of offenses described in subdivision (a)(4) of this section is somewhat broad, it becomes genuinely narrowed by the aggravating circumstances listed in § 5-4-604. *Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993).

The overlapping of subdivision (a)(4) of this section and § 5-10-102(a)(2) does not constitute some sort of constitutional violation. *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993).

Subdivision (a)(4) is not unconstitutional under the federal Eighth and Fourteenth Amendments to the federal constitution because it fails to adequately narrow the class of persons eligible for the death penalty and permits arbitrary prosecutions. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995).

This section sufficiently narrows the class of murderers eligible for the death penalty by specifying only a subgroup of murderers as capital ones. *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996), cert. denied, 519 U.S. 968, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996).

This section does not unconstitutionally overlap with § 5-10-102. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

The Arkansas Supreme Court, in *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996), did not read out of the capital-felony-murder statute the fourth element of the offense (circumstances manifesting extreme indifference), and it is this element that performs the constitutionally required narrowing function. *Ruiz v. Norris*, 104 F.3d 163 (8th Cir. 1997).

This section does not have an unconstitutional overlap in the definitions of capital felony murder and first-degree felony murder. *Jones v. State*, 328 Ark. 307, 942 S.W.2d 851 (1997).

Subsection (b) does not improperly shift the state's burden of proof of proving every element of the offense beyond a reasonable doubt to the defendant and, therefore, the subsection is not violative of the due process clause. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999).

—Cruel and Unusual Punishment.

Upon conviction of capital felony murder, defendant's sentence of life imprisonment without parole was not cruel or unusual punishment, where the sentence was within limits established by the legislature. *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976) (decision under prior law).

Sentence of life imprisonment without parole was within the statutory limits of § 5-4-602 and thus not cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

The Arkansas death penalty statute as a matter of law, as opposed to a matter of personal conscience, does not violate the Eighth Amendment's ban on cruel and unusual punishment. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

—Standing.

Defendant, having received a sentence of life without parole, had no standing to challenge the constitutionality of the death penalty. *Van Pelt v. State*, 306 Ark. 624, 816 S.W.2d 607 (1991).

Defendant lacked standing to argue that the capital felony murder statute is constitutionally invalid because no narrowing mechanism exists where the defendant did not receive the death penalty. *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

—Vagueness.

The overlapping nature of this section and § 5-10-102 does not render those statutes unconstitutional in their application. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981); *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988); *White v. State*, 298 Ark. 55, 764 S.W.2d 613 (1989); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, cert. denied, 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991).

Capital murder statute and the first-degree murder statute are not vague, since they clearly set out what acts are prohibited and are not constitutionally infirm, even though they overlap, because there is no impermissible uncertainty in the definition of the offenses. *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Where the wording of the capital felony murder statute and the first-degree murder statute overlap, such overlapping is not unconstitutionally vague and the overall scheme is not unconstitutional. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The capital murder statute and the first-degree murder statute, § 5-10-102, are not unconstitutionally vague even though they overlap in such a way that an accused may be charged with either crime

for the same conduct. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981); *Penn v. State*, 284 Ark. 234, 681 S.W.2d 307 (1984).

The overlap of subdivision (a)(1) of this section and of § 5-10-102(a)(1) does not render them unconstitutionally vague, since they clearly set out what acts are prohibited and there is no impermissible uncertainty in the definition of the offenses. *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981), cert. denied, 456 U.S. 1008, 102 S. Ct. 2301, 73 L. Ed. 2d 1304 (1982).

The defendant's argument that the capital murder sentencing statutes are unconstitutionally vague in that the aggravating circumstances of § 5-4-604 are too closely related to the elements of capital felony murder as set out in this section was explicitly rejected because the aggravating circumstances are not an element of capital murder. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

Overlapping between "premeditation and deliberation" in the capital murder statute and "purpose" in the murder one statute does not render the two statutes void for vagueness. *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, cert. denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992).

The offense of premeditated and deliberated capital murder does not violate the constitutional prohibition of vagueness. *Smith v. State*, 306 Ark. 483, 815 S.W.2d 922 (1991).

While this section and § 5-10-102 may appear to overlap on the degree of required intent, this does not render them unconstitutional due to vagueness or arbitrariness. *Van Pelt v. State*, 306 Ark. 624, 816 S.W.2d 607 (1991); *Simpson v. Lockhart*, 942 F.2d 493 (8th Cir. 1991).

This section is not unconstitutionally vague nor does it deny a defendant equal protection because it overlaps with the first degree felony murder statute, § 5-10-102. *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), aff'd in part, rev'd in part, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995).

The statute for murder in the first degree, § 5-10-102, and this section, are not

unconstitutionally vague, and any overlap in the two sections does not create a constitutional infirmity in the sections. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

This section is not void for vagueness. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

This section is not void for vagueness or because of its overlap with § 5-10-102(a)(2). *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000).

Accomplice.

Evidence was sufficient to support the defendant's conviction as an accomplice to capital murder. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Allen v. State*, 324 Ark. 1, 918 S.W.2d 699 (1996); *Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996).

A person need not take an active part in a murder to be convicted of such if the person accompanied the person or persons who actually committed the murder and assisted in such commission. *Hallman v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *White v. State*, 298 Ark. 55, 764 S.W.2d 613 (1989); *Sellers v. State*, 300 Ark. 280, 778 S.W.2d 603 (1989); *Walker v. State*, 308 Ark. 498, 825 S.W.2d 822 (1992).

Where defendant was an accomplice and had the requisite intent, the fact that defendant's role in the crime was of a nonviolent nature, and that defendant was unaware that the victim would be killed, made no difference. *Dixon v. State*, 319 Ark. 347, 891 S.W.2d 59 (1995).

Evidence presented at trial was sufficient to support defendant's conviction where the jury could reasonably have found that he in some way solicited, commanded, induced, procured, counseled, or aided in the commission of the crime; further, a statute cited by defendant stating that, because he was a juvenile at the time of his offense, his parent should have been present during questioning had not yet been enacted at the time he himself was questioned. *Jackson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 557 (Oct. 7, 2004).

Affirmative Defense.

To establish the affirmative defense un-

der subsection (b), a defendant must prove that he was not the only participant, that he did not commit the homicide act and that he did not in any way solicit, command, induce, procure, counsel, or aid in the commission of the homicide act; obviously, none of these elements are elements of the crime of capital felony murder. *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606, 80 L. Ed. 2d 135 (1984).

No rational basis for affirmative defense instruction held shown. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

Where defendant's defense to capital felony murder charge was that he had nothing to do with the victim's death, and in fact claimed that two other men were implicated in the beating and killing of the victim, it would have made no sense to instruct on the lesser offense of first-degree-felony murder. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

The evidence established that the defendant was not entitled to the affirmative defense under subsection (b) where the co-perpetrator testified that (1) the defendant asked the victim to follow her back across town after she dropped the co-perpetrator off, (2) she specifically told the co-perpetrator to follow them and to rob the victim, (3) she told the co-perpetrator that the victim asked her if she would have sex with him if he paid her, and (4) she told the co-perpetrator that she would go into the back of the victim's van and that he should then shoot the victim and take his money. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000).

Jury could reasonably conclude from defendant's actions during the robbery that defendant induced, procured, or aided in the murder of the victim and the affirmative defense under subsection (b) of this section did not apply where defendant: (1) agreed to rob a store; (2) controlled the stocker in the store while the accomplice took the money from the manager; (3) ushered the victims into the cooler at gun point; and (4) helped keep control of the victims. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002).

Aggravating Circumstances.

There is no distinction based upon the finding of aggravating circumstances between capital murder under this section and murder in the first degree under § 5-

10-102 since neither section makes aggravating circumstances an element of the offense; thus, there is no need to make a finding of some aggravating circumstances in order to sustain a conviction for capital murder. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Where the jury could properly find that the victim was killed to prevent any identification of the assailant, the death penalty statute was not unconstitutionally applied to defendant who argued that aggravating circumstance of killing "to avoid arrest" would apply to every felony murder. *Woodard v. Sargent*, 567 F. Supp. 1548 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir. 1985), vacated and remanded, 476 U.S. 1112, 106 S. Ct. 1964, 90 L. Ed. 2d 650 (1986).

Everyone who commits murder in the course of a robbery commits the crime for purposes of pecuniary gain; therefore, the pecuniary-gain aggravating circumstance unconstitutionally duplicates an element of the underlying offense of capital felony murder. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

In a conviction upon defendant's having slain two persons, "pecuniary gain" would be a permissible aggravating circumstance. *Perry v. Lockhart*, 656 F. Supp. 46 (E.D. Ark. 1986), aff'd in part, rev'd in part, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Agreement to Kill.

Subdivision (a)(7) does not require that an actual exchange of something for value take place in order to establish the offense; proof is only necessary that there be an agreement to kill in exchange for something of value. *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

Evidence as to the existence of an agreement between murderer and defendant to cause the death held insufficient to support a conviction of capital felony murder. *Ketelson v. State*, 317 Ark. 324, 877 S.W.2d 910 (1994).

Another Person.

The statutory phrase "another person" means a person other than the defendant himself. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

Appeal.

Defendant's argument on appeal that there was insufficient evidence to support the underlying felony of aggravated robbery was not considered where defendant failed to preserve this point for review under the procedure required by ARCrP 36.21(b). *Davis v. State*, 320 Ark. 329, 896 S.W.2d 438 (1995).

Appellate Review.

Although the jury should be instructed that circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion, the standard on appeal is to determine whether the verdict is supported by substantial evidence, which means whether the jury could have reached its conclusion without resorting to speculation or conjecture. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

An automatic review of the entire record in all death-penalty cases is useful when evaluating whether a defendant's waiver of his right to appeal was proper under *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). Such a review would also enable the court to determine (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with Ark. Code Ann. § 16-91-113(a) (1987) and Ark. Sup. Ct. R. 4-3(h); (2) whether any plain errors covered by the exceptions outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (3) whether other fundamental safeguards were followed. *State v. Smith*, 340 Ark. 257, 12 S.W.3d 629 (2000).

Assistance of Counsel.

Where the defendant's attorney failed to notify him as to the trial date and as a result the defendant missed the first day of trial, and during the defendant's absence, counsel stipulated to the cause of death and to allow the State Crime Laboratory report into evidence, the defendant was denied effective assistance of counsel as counsel lost for the defendant the right to cross-examination, which probably would have proved that the shotgun blast fired by the defendant did not strike the victim directly, and if there were any intervening events which caused or contrib-

uted to the victim's death. *Mason v. State*, 289 Ark. 299, 712 S.W.2d 275 (1986).

Where the defendant's attorney did not notify him of the trial date and, as a result, the defendant missed the first day of trial, the defendant was denied effective assistance of counsel, even though the attorney waived the defendant's presence as a matter of trial strategy, because the defendant was not able to participate in any manner in the selection of jurors taken the first day. *Mason v. State*, 289 Ark. 299, 712 S.W.2d 275 (1986).

Burden of Proof.

Nothing in either this section or § 5-10-102 relieves the state from proving each element necessary to constitute a higher degree of culpability than the first-degree murder statute in trying a case under the capital murder statute, and nothing relieved the state of the absolute burden of proving each element of the offense beyond a reasonable doubt. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Subsection (b) does not impermissibly absolve the state of the duty of proving any element of capital felony murder beyond a reasonable doubt, and trial court did not err in failing to submit the affirmative defense as ordinary defense without burden of proof being placed on defendant. *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606, 80 L. Ed. 2d 135 (1984).

The burden on the defendant to prove an affirmative defense, such as the affirmative defense of nonparticipation does not arise until the State has met its burden of proof as to the elements of the offense. *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606, 80 L. Ed. 2d 135 (1984); *Breault v. State*, 280 Ark. 372, 659 S.W.2d 176 (1983).

In a prosecution for capital murder, the burden on the defendant to prove an affirmative defense by preponderance of the evidence does not arise until after the state has proved every element of capital felony murder beyond a reasonable doubt. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

The state was required to prove beyond a reasonable doubt all the elements of the

offense of capital murder; proof of the nonexistence of the affirmative defense of self-induced intoxication was not constitutionally required. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

Proof of either robbery/murder or multiple killings is sufficient to convict of capital murder and make the defendant death-eligible. *Perry v. Lockhart*, 656 F. Supp. 46 (E.D. Ark. 1986), *aff'd in part, rev'd in part*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

The state is not required to prove premeditation and deliberation for a conviction under subdivision (a)(9) of this section. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996).

Child Abuse.

Evidence, although circumstantial, that defendant engaged in cruel, malicious, and continuous course of child abuse culminating in a violent act that caused a child's death held sufficient to sustain a conviction under subdivision (a)(9) of this section. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996).

There was ample circumstantial evidence for the jury to find that defendant knowingly caused the death of the infant. *Steggall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000).

Death Penalty.

The defendant's death sentence, which was based in part on the pecuniary-gain aggravating circumstance, was set aside, even though his case was decided before *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied* — U.S. —, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985), which held that the pecuniary-gain aggravating circumstance could not be used to impose the death penalty for a murder in the course of a robbery where the defendant's counsel urged this argument when the action was first appealed. *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986) (decision under prior law).

Because the aggravating circumstance of pecuniary gain is invalid as applied in cases of capital felony murder committed during the course of robberies, the death penalties imposed against the defendants were invalid and set aside, where this argument was made when the actions were first appealed. *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986).

The capital felony murder statute does not amount to a mandatory death sentence because the jury cannot show mercy regardless of its findings. *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988).

Evidence sufficient to find that the death penalty was not freakishly or arbitrarily applied. *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993), *cert. denied*, 511 U.S. 1026, 114 S. Ct. 1417, 128 L. Ed. 2d 88 (1994).

Degree of Offense.

The homicide statutes do not confer arbitrary power upon prosecutors and juries to select between capital murder and murder in the first degree. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

Double Jeopardy.

In proving the specified underlying felony, there must be proof of the same or less than all of the elements required to establish the commission of the capital offense and the specified felony is thus an included offense which falls within the double conviction prohibition of § 5-1-110, and the double jeopardy prohibition of the Fifth Amendment of the United States Constitution. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

It was illegal to enter a judgment of conviction for both attempted capital felony murder and aggravated robbery when the aggravated robbery was the underlying specified felony to the charge of attempted capital murder, because aggravated robbery is a lesser included offense and in proving the elements of attempted capital murder, it was necessary to prove the elements of aggravated robbery; therefore, the conviction and sentence for aggravated robbery would be set aside. *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982).

Where the defendant was convicted and sentenced for both attempted capital murder and aggravated robbery, his conviction and sentence for the lesser included offense of aggravated robbery had to be set aside since aggravated robbery was the underlying specified felony to the charge of attempted capital murder. *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982).

Defendant was properly convicted of capital murder and arson after he told a

neighbor that his trailer home exploded while his girlfriend was inside; the constitutional prohibition against double jeopardy was not violated because § 5-1-110(d)(1)(A) permitted a sentence for both crimes. *Meadows v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 492 (Sept. 16, 2004).

Evidence.

Photographs of victim and crime scene held admissible. *Rodgers v. State*, 261 Ark. 293, 547 S.W.2d 419 (1977); *Hulsey v. State*, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 220, 59 L. Ed. 2d 194 (1978) (preceding decisions under prior law); *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982); *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984); *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986); *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420 (1986); *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989), cert. denied, 498 U.S. 883, 111 S. Ct. 218, 112 L. Ed. 186 (1990).

Evidence was sufficient to establish the motive for the crime. *Bush v. State*, 261 Ark. 577, 550 S.W.2d 175 (1977).

Evidence held insufficient to support the charge of murder. *Bly v. State*, 263 Ark. 138, 562 S.W.2d 605 (1978); *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341, cert. denied, 497 U.S. 1011, 110 S. Ct. 3257, 111 L. Ed. 2d 766 (1990).

Evidence held sufficient to support the defendant's conviction. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983), cert. denied, 464 U.S. 934, 104 S. Ct. 340, 78 L. Ed. 2d 308 (1983); *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); *Surrridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983); *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983); *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865,

104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984); *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987); *Cassell v. Lockhart*, 886 F.2d 178 (8th Cir. 1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1164, 107 L. Ed. 2d 1067 (1990), cert. denied, 493 U.S. 109, 110 S. Ct. 1164, 107 L. Ed. 2d 1067 (1989); *Ferguson v. State*, 298 Ark. 600, 769 S.W.2d 418 (1989); *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Remeta v. State*, 300 Ark. 92, 777 S.W.2d 833 (1989); *Thomas v. State*, 300 Ark. 103, 776 S.W.2d 821 (1989); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Findley v. State*, 300 Ark. 265, 778 S.W.2d 624 (1989); *Sellers v. State*, 300 Ark. 280, 778 S.W.2d 603 (1989); *Segerstrom v. State*, 301 Ark. 314, 783 S.W.2d 847 (1990); *Burkhart v. State*, 301 Ark. 543, 785 S.W.2d 460 (1990); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420 (1990), cert. denied, 499 U.S. 913, 111 S. Ct. 1123, 113 L. Ed. 2d 231 (1991); *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992); *Moss v. Lockhart*, 971 F.2d 77 (8th Cir. 1992); *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242 (1993); *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993); *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994); *Pike v. State*, 323 Ark. 56, 912 S.W.2d 431 (1996); *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996); *Slocum v. State*, 325 Ark. 38, 924 S.W.2d 237 (1996); *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999); *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999); *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000); *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000); *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000); *Hutts v. State*, 342 Ark. 278, 28 S.W.3d 265 (2000); *Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001).

Evidence held sufficient to find that the trial court's ruling that there was no evidence to indicate a lesser degree of murder was error. *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980); *Hughes v. State*, 303 Ark. 340, 797 S.W.2d 419 (1990).

Evidence sufficient to find that officer was acting in the line of duty as required by subdivision (a)(2) (now subdivision (a)(3)). *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

Prosecutor's attempt to introduce pho-

tograph of victim's body, which had been ruled inadmissible, did not constitute reversible error where the court sustained defense counsel's objections and the photograph was never viewed by the jury. *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied, 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

Evidence relating to motive and intent held admissible. *Edgemon v. State*, 275 Ark. 313, 630 S.W.2d 26 (1982); *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983); *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Circumstantial evidence alone may be sufficient to support a conviction for capital felony murder since the law makes no distinction between circumstantial evidence and direct evidence. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Where defendant was the last person to see his ex-girlfriend alive, admitted to accidentally shooting her, and was seen near the scene of the crime, the evidence was sufficient to support his conviction for capital murder. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003).

Evidence was sufficient to convict defendant of capital murder; defendant's admission to strangling the victim and the use of duct tape over the mouth and nose of the victim constituted substantial evidence supporting the jury's conclusion of guilt, and there was evidence that defendant weighed what he was about to do and that he engaged in planning prior to the murder. *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004).

Defendant's conviction for the capital murder of an 87-year-old woman, who was found shot to death in her yard, was upheld where defendant confessed to police that he "shot the old lady in the back." *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Evidence held not exculpatory. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), rein-

stated on reh'g, 915 F.2d 372 (8th Cir. 1990).

Defendant waives any objections to use of statement made by him to police by placing it in evidence. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Defendant held not prejudiced at trial by codefendant's refusal to answer deposition questions. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Testimony of confessed accomplice held sufficiently corroborated. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

Evidence held sufficient to show premeditation and deliberation. *Watson v. State*, 289 Ark. 138, 709 S.W.2d 817 (1986); *Farris v. State*, 308 Ark. 561, 826 S.W.2d 241 (1992).

Evidence defendant was serving prison sentence held not error. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Defendant's involuntary statement cannot be used by state in cross-examination of defense witness. *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420 (1986).

Defendant's statement to police, although inadmissible as evidence during the state's case-in-chief, could be used by the prosecuting attorney in cross-examination and impeachment of defense witness. *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420 (1986).

In prosecution for capital felony murder, the trial court did not abuse its discretion in admitting several color photographs of the victim, who had been strangled in an abandoned building in subfreezing weather, placed on a heap of trash, and burned, where the medical examiner testified the photographs especially supported his conclusions. *Watson v. State*, 290 Ark. 484, 720 S.W.2d 310 (1986).

In prosecution for capital felony murder, the jury could consider the defendant's statements, which at first were denial, then an admission of being there and then a statement that he burned the body to hide the evidence; a jury may consider and give weight to any false, improbable, and contradictory statements made by an accused explaining suspicious circumstances. *Watson v. State*, 290 Ark. 484, 720 S.W.2d 310 (1986).

Prejudicial error in allowing confession to be introduced into evidence required reversal. *Rose v. State*, 294 Ark. 279, 742 S.W.2d 901 (1988).

It was error to have permitted the jury to find defendant guilty of capital murder on the basis that it was committed in the course of burglary where the jury was not allowed to consider the robbery or any purpose for the entry of the victim's home independent of the acts which resulted in his death. *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988).

Where the petitioner was charged with three forms of capital murder, since the form only required a finding of guilty or not guilty and because there was ample evidence to sustain the first two theories, the petitioner failed to demonstrate prejudice. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

Proof of aggravated burglary, committed by the defendant an hour after the offense he was on trial for, was clearly admissible as being relevant to prove both his intent and plan, as well as his identity, in the commission of the first incident because it was so factually intertwined with the present offense, although the circumstantial evidence was amply sufficient to connect the defendant with the first incident. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

Circumstantial evidence, consisting of the close proximity of time and place of the killing and the taking of the decedent's property so as to make it all one transaction, was sufficient to allow the jury to conclude the killing occurred in the course of robbery. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

The trial court's decision to allow witness' in-court identification, irrespective of his prior encounter with the defendant at the police station, was proper where there was no evidence suggesting that the police brought the defendant to the station to facilitate an identification by the witness; the witness made his initial identification spontaneously and before the defendant was brought inside the building; and he could not have known for certain that the person who was getting out of the sheriff's car was indeed the suspect in that crime. *Van Pelt v. State*, 306 Ark. 624, 816 S.W.2d 607 (1991).

The robbery and murder did not have to occur within a brief interval of time to support a capital murder conviction. *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991).

Inflammatory photographs are admissi-

ble if they tend to shed light on an issue, enable a witness to better describe the objects portrayed, or enable the jury to better understand the testimony. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Where the trial court considered the questioned photographs, each individually, on two separate occasions at a pre-trial conference and again at trial, it did not admit the photographs with "carte blanche" approval, or with a manifest abuse of its discretion. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Where the trial court twice considered the admissibility of a videotape of the crime scene showing the house and the body, and placed limitations on the portions that could be published to the jury, it did not abuse its discretion in admitting the tape into evidence. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

The evidence of robbery and intent to rob held sufficient to support a conviction for capital murder. *Owens v. State*, 313 Ark. 520, 856 S.W.2d 288 (1993).

Evidence was sufficient to sustain capital murder conviction, even though it was almost all circumstantial. *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993), cert. denied, 511 U.S. 1026, 114 S. Ct. 1417, 128 L. Ed. 2d 88 (1994).

Defendant's flight to avoid arrest could be considered as corroboration of evidence tending to establish his guilt of capital murder. *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993), cert. denied, 511 U.S. 1026, 114 S. Ct. 1417, 128 L. Ed. 2d 88 (1994).

Where the weapon used was a .22 caliber semi-automatic rifle with a sawed off stock, the victim suffered five bullet wounds, two entered his front and three entered his back, the nature and manner of use of the weapon was sufficient to support the capital murder verdict. *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993).

The mere presence of human blood found by luminol testing, without factors which relate that evidence to the crime, is not admissible. *Palmer v. State*, 315 Ark. 696, 870 S.W.2d 385 (1994).

Defendant's conviction for conspiracy to commit capital murder was supported by substantial evidence. *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994).

A videotape which showed the crime

scene and shed light on the violence done and photographs of crime scene and victim were admissible where they showed the nature and extent of the wounds, which was relevant to a showing of intent, as intent may be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the wounds, and where they also helped the state prove an element of its case against appellant — the requisite level of intent associated with capital murder. *Williams v. State*, 316 Ark. 694, 874 S.W.2d 369 (1994).

Evidence of defendant's identification held sufficient to sustain conviction. *Jacobs v. State*, 316 Ark. 698, 875 S.W.2d 52 (1994).

Defendant's admission of active participation in the rape and murder of victim, along with the evidence that defendant was seen with victim on the night she disappeared, was sufficient to sustain the conviction. *Evans v. State*, 317 Ark. 449, 879 S.W.2d 409 (1994).

Even if the trial court had erred in admitting items seized in a motel room, the other evidence of defendant's guilt overwhelming supported the convictions for aggravated robbery and capital murder. *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994).

Conviction for felony murder supported by substantial, albeit not overwhelming, evidence where circumstantial evidence rather than direct evidence placed defendant at the scene. *Hill v. Norris*, 96 F.3d 1085 (8th Cir. 1996).

Gang-affiliation evidence held admissible to show motive. *Scott v. State*, 325 Ark. 267, 924 S.W.2d 248 (1996).

Even assuming witness was an accomplice to the murder, there was sufficient corroborative evidence presented to connect defendant to the murder. *Choate v. State*, 325 Ark. 251, 925 S.W.2d 409 (1996).

Evidence of capital murder held sufficient where five witnesses testified that defendant had confessed to shooting the victim and where evidence found around victim's body indicated that he had been shot by a rifle owned by the defendant. *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996).

Testimony of accomplice to the victim's kidnapping prior to the murder was sufficiently corroborated to support defen-

dant's conviction for first-degree murder. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996).

Statement containing knowledge of crime not known by the general public accompanied by witness' overhearing a direct confession was sufficient to sustain conviction for capital murder. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Where the State's theory was that the murders were cult-related, and there was additional evidence about occult practices, a book about the occult and evidence that the defendant had been seen dressed like a wizard provided a circumstantial link and was therefore relevant. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

Videotape, photographs of the crime scene, and two autopsy photographs aided the jury's perception of the crime scene and condition of the victims' bodies and was relevant in establishing premeditation and deliberation. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997); *Lever v. State*, 333 Ark. 377, 971 S.W.2d 762 (1998).

Evidence of drug use and drug dealing was clearly intermingled and contemporaneous with the arson, culminating in the commission of the crimes charged, and as such, it was part of the *res gestae* and admissible as an exception to Rule 404(b). *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000).

The evidence established not only that defendant had every opportunity and motive to kill the victims, but also then destroyed evidence relating to their disappearance, so that the *mens rea* suggested by the details of the killings satisfied the requirements of premeditated and deliberate purpose. *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000).

Evidence of capital murder held sufficient where defendant was present at the crime scene, knew the robbery of the victim's store had been planned and where defendant's attempts to evade the police officers corroborated his guilt. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001).

Evidence presented at trial was sufficient to sustain defendant's capital murder conviction where: (1) defendant admitted firing three to four shots at the victim

while the victim was outside a convenience store where the victim's death occurred; (2) the jury could have used those circumstances to infer that defendant acted with premeditated and deliberate intent; and (3) a witness heard defendant confess to murdering the victim. *Jenkins v. State*, 348 Ark. 686, 75 S.W.3d 180 (2002).

In a criminal prosecution for first-degree murder, the trial court did not abuse its discretion in allowing tattoo evidence at trial; the tattoo, which read "Death Before Dishonor," was probative of defendant's motive in the shooting the victim following an altercation. *Morris v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 515 (Sept. 23, 2004).

Where, following an altercation in the parking lot of a nightclub, defendant's car and victim's car were side by side at an intersection, defendant believed he saw a gun pointed at him from the victim's car, and defendant shot into the other car two or three times, striking and killing the victim, the evidence was sufficient to convict defendant of first-degree murder. *Morris v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 515 (Sept. 23, 2004).

Evidence was sufficient to sustain a conviction for attempted capital murder where there was substantial evidence that defendant was not merely engaged in the "act of driving"; the victim, a police officer, testified that the driver attempted to run him over, he observed a flash from the passenger side window, he realized that he had heard a gunshot, and an officer identified defendant as the driver of the vehicle. *Clark v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 516 (Sept. 23, 2004).

Jury could infer that defendant shot the victim in order to steal drugs and money from the victim, based on defendant's own account of what occurred; thus, there was substantial evidence that defendant shot and killed the victim during the course of, and in furtherance of, an aggravated robbery. *Harper v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 555 (Oct. 7, 2004).

Evidence was sufficient to convict defendant of criminal attempt to commit capital murder where (1) while searching for a suspect, the trooper stopped in the middle of a street and observed a vehicle 30-40 yards away; (2) the vehicle began moving towards the trooper with its headlights

on; (3) the trooper then observed a flash from the passenger-side window and heard a pop, which he thought was a gunshot; (4) the trooper believed that he was shot at because he was the only person on the street at 1:30 a.m.; (5) the vehicle was later stopped and a spent shell casing that was found inside the vehicle on the passenger side matched a weapon that was found about a block and a half away from where the vehicle ultimately stopped; and (6) witnesses testified that defendant and the driver had just left the home of the suspect's aunt, whom the trooper had been previously chasing. *Simmons v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 920 (Dec. 8, 2004).

Where witness testified that (1) he was in victim's home the day of the murder, (2) defendant arrived with a folding knife and entered victim's bedroom, (3) the victim screamed, (4) defendant's husband stated that defendant had killed the victim, and (5) the witness saw the husband take a can of kerosene from the front porch, there was substantial evidence in support of the jury's conviction of defendant for capital murder and arson. *Meadows v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 767 (Dec. 9, 2004).

Evidence showing that appellant formed a plan to lure the victim into his vehicle with the purpose of injuring or killing him, and that the victim died under circumstances manifesting extreme indifference to the value of human life, was sufficient to support appellant's conviction of capital felony murder, with the underlying charge of kidnapping. *Ridling v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 58 (Jan. 27, 2005).

Evidence clearly supported the state's charges that defendant acted with premeditation and deliberation in the murder of the victim; the state demonstrated that defendant tried to clear the potential witnesses away from the area, pulled the victim into the house against his wishes, closed the door so the act could not be seen, helped dispose of the body and had the victim's car towed away from in front of his house. *Woods v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 499 (Sept. 22, 2005).

Defendant's conviction for capital murder under subdivision (a)(4) of this section was affirmed as the trial court did not err

in denying defendant's directed verdict motion; there was ample testimony from eyewitnesses and an assistant medical examiner regarding defendant's shooting of the unarmed victim to support the jury's finding of premeditated and deliberated capital murder in spite of defendant's contention of self-defense. *Stenhouse v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 347 (June 2, 2005).

Indictment or Information.

Mistake in information in specifying subsection of this section held harmless error. *Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979).

Where amended information did not substantially affect the degree of the alleged crime for the original information which specifically designated first-degree murder as a capital felony and the amended information charging capital felony murder were virtually identical but for the statutory designation of the offense; the nature of the crime charged was not affected by the amendment. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

Where the count of the information relating to the criminal attempt to commit capital felony murder gave the date of the alleged offense and stated that the conduct created a substantial step in a course of conduct intended to culminate in the murder of a witness, under the circumstances of the case, the conduct charged had to arise pursuant to subdivision (a)(1); while the court should have required the state to identify the specific statute it relied upon to support the count, failure to do so did not prejudice the defendants. *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983).

Where language in the information closely follows that in subdivision (a)(7), defendant has no valid complaint regarding the charge. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

Where the only effect of the amendment to the information was to split the original single count of capital murder into two counts of capital murder under the new statutory definition of that offense, this amendment was a matter of form that did not change the nature of the offense charged. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

The trial court did not err in allowing the state to amend the information charg-

ing "attempt to commit capital felony murder" by allowing the deletion of the word "felony," after the state had rested its case in chief, and after the defendant's motion to dismiss, because allowing the state to strike the word "felony" from each information did not cause any real change in the nature or degree of the charges against the defendant. *Ledguies v. State*, 46 Ark. App. 144, 877 S.W.2d 946 (1994).

Pretrial amendment of an information that charged capital murder on the basis of felony murder to add, as an alternative, the charge of capital murder on the basis of premeditated and deliberated purpose, does not change the nature of the crime charged in violation of § 16-85-407(b), nor does the amendment of an information that adds an allegation of habitual offender change the nature or degree of the crime. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

Although a deputy prosecutor had signed the first amended information in the name of the prosecutor, but without the prosecutor's consent, the requirements of Ark. Const. Amend. 21 and subject-matter jurisdiction were met where a later amended information was signed by the prosecutor; the State's first amended information did not taint the subsequent amendments properly filed. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

The State's amended information, which charged defendant with one count of capital murder, but alleged both premeditated and deliberated murder "and" capital felony murder while committing robbery and burglary, did not change the nature and degree of the offense and did not prejudice the defendant. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

Indifference to Human Life.

Evidence held sufficient for jury conclude that the death was caused under circumstances manifesting extreme indifference to the value of human life. *Williams v. State*, 281 Ark. 387, 663 S.W.2d 928 (1984).

Conduct manifesting extreme indifference to human life indicates that the perpetrator of capital murder must act with deliberate conduct which culminates in the death of some person. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985); Bur-

nett v. State, 295 Ark. 401, 749 S.W.2d 308 (1988).

There was substantial evidence of conduct manifesting extreme indifference to the value of human life where the victim was severely bruised, her teeth were broken, and she was strangled. *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997).

In a prosecution for capital felony murder on the basis that the defendant killed a child during the course of and in furtherance of raping her under circumstances manifesting extreme indifference to the value of human life, a jury finding of the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing arrest did not improperly elevate the requisite mental state for the charged crime since that crime required proof of deliberate conduct by the defendant and the requirement of deliberate conduct was consistent with the conclusion that the decision to kill the child, after raping her, was motivated by the defendant's desire or purpose to avoid arrest. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

The language making knowingly causing the death of a person 14 years of age or younger a capital offense if committed with extreme indifference for human life is defined as acting with deliberate conduct that culminates in the death of some person. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001).

Evidence was sufficient to sustain a capital murder conviction where defendant broke into a home, raped one victim, stole money, and killed another victim; this was done under circumstances manifesting extreme indifference to the value of human life. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

In a capital murder case, the state proved defendant's extreme indifference to the value of human life under subdivision (a)(1) of this section where a witness testified that defendant demanded to hold the gun in the robbery, the witness saw defendant point an arm at the victim, defendant admitted to the shooting during a custodial interrogation but claimed the gun discharged accidentally when the delivery man grabbed it, and expert testimony showed that the fatal shot was not

made at a close range. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

Evidence was sufficient to establish that defendant caused the victim's death under circumstances manifesting extreme indifference to the value of human life where defendant (1) admitted pointing a loaded gun at one victim in the course of a robbery, (2) fired a gun at another unarmed victim from less than three feet away, (3) repeatedly threatened to shoot all three victims throughout the ordeal, (4) used a gun to shoot the victim at close range and admitted the shooting was intentional, and (5) not only cursed the victim as he died, but threatened the other victims and locked them in a room so he could get away. *Porter v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 489 (Sept. 16, 2004).

Instructions.

If the evidence presented at trial warrants instructions on lesser included offenses, such instructions must be given. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

Where the trial judge clearly instructed the jury that it could find defendant guilty of capital felony murder if she killed the victim either to rob him or in furtherance of the escape, there was no unreasonable discretion in such circumstances; the jury had to find her guilty of murder committed in the course of or in furtherance of a defined felony. *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

Where in murder prosecution trial, judge instructed the jury as to capital felony murder, murder in the first degree, murder in the second degree, and manslaughter, it could not be said that the application of this section precluded consideration of the lesser offense of murder in the first degree. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Where two persons are murdered, there can be no evidence to support an instruction on first-degree murder because § 5-10-102 involves the premeditated and deliberate death of one person; accordingly, it was proper for the trial judge, in a double murder prosecution, to give instructions on capital murder, murder in the second degree, and manslaughter, but to refuse to give a requested instruction on murder in the first degree. *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981).

Failure to instruct the jury on the elements of aggravated robbery and robbery in conjunction with its instructions on first-degree murder where the court had already instructed the jury on the elements of those crimes when it gave the charge of capital murder held not to be prejudicial error. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

Jury instruction which equated guilt with punishment held to be erroneous. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

Defendant held not prejudiced by the instruction on lesser included offense since the jury convicted him of the greater offense of capital felony murder. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

Court's failure to instruct on lesser included offenses was reversible error. *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983).

The trial court should not attempt to explain matters concerning parole or executive clemency to a jury; thus, refusal to give the instruction to the effect that if defendant were sentenced to life without parole, he would serve the rest of his life in prison was proper. *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186, cert. denied, 469 U.S. 963, 105 S. Ct. 362, 83 L. Ed. 2d 298 (1984).

In a prosecution for attempted capital murder, the trial court properly instructed the jury on both the use of physical force in self defense and deadly force in self defense despite defendant's insistence that only the instruction on physical force be given since it is the trial court's responsibility to give wholly correct instructions and the jury heard evidence that the defendant could have used either physical or deadly force. *Elmore v. State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985).

The giving of the Allen charge in a capital murder prosecution was erroneous as it would encourage unanimity and possibly encourage a penalty of death in order to avoid a retrial, even though if the jury did not unanimously agree on the death sentence their verdict would automatically stand at life without parole, and there would not be a retrial. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986).

When capital felony murder is charged under subdivision (a)(1) of this section,

first degree felony murder is "a lesser included offense" because the same evidence used to prove the former of necessity proves the latter; therefore, an instruction of first degree murder is required. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986); *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991).

Where the defendant was charged with homicide in the course of a burglary, the failure to instruct on first degree murder was not reversible error because the objection of counsel was that the court should have given the instruction because of evidence, which counsel could not recite, that the defendant entered the victim's residence for a purpose other than to commit a burglary. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Trial judge erred when he instructed jury not only on offense described in information, but also on an offense relating to murder during the commission of a felony. *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987).

Where victim testified that defendant deliberately shot him through a car window the testimony provided a basis in the evidence for the trial court's instruction on attempted capital murder. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

Instructions in defendant's felony murder trial did not deny him due process by improperly shifting the burden of proof to him. *Moss v. Lockhart*, 971 F.2d 77 (8th Cir. 1992).

Where defendant claims that his counsel was ineffective by failing to object to defective instructions of capital murder, defendant must show that, but for his counsel's failure to object to the trial court's omission when instructing the jury on capital felony murder, the jury would have reached a different decision. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

In cases involving a trial court's giving of an erroneous instruction involving the trial mechanism to be used in deciding either a civil or criminal case, the appellant is not required to demonstrate prejudice; such a requirement is often an impossible burden, and the requirement of an impossible burden, in effect, renders the requirement of correct instructions on the law meaningless. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996).

According to the evidence presented at trial, there was a plan between defendant and the accomplice to kill a drug dealer during the drug transaction, defendant admitted to driving the truck to a remote location, there was also some evidence that defendant was in a scheme to murder the victim for a fee, defendant lied about the victim's whereabouts, and defendant fled from the scene; thus, there was ample evidence to rationally support the giving of an instruction on the lesser-included offense of first-degree murder. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Intent.

Whether defendant lacked the ability to form an intent to commit murder was a jury question. *Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985).

Intent to kill is not an element of the offense under subdivision (a)(1). *Sellers v. State*, 300 Ark. 280, 778 S.W.2d 603 (1989).

Under subdivision (a)(1) of this section, it is not necessary that the State show that the defendant took an active part in the killing so long as he assisted in the commission of the underlying crimes; a defendant must only have the requisite intent for the underlying felony. *Dixon v. State*, 319 Ark. 347, 891 S.W.2d 59 (1995).

The nature and extent of a victim's wounds is relevant to a showing of intent. *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997).

Evidence was sufficient to establish intent where the defendant inmate twice struck an officer on the head with a table leg, the officer served on a committee that disciplined the defendant only two days before the incident, and the defendant was unhappy with the outcome. *Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000).

Absent a legally-recognized defense, where defendant intentionally caused the death of another, his act constituted murder; although defendant claimed he shot his live-in companion because she was ill and he felt sorry for her, it was completely irrelevant that the act was motivated by love rather than malice. *Boyle v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 561 (Sept. 29, 2005).

Judicial Review.

In determining the sufficiency of evidence to uphold a conviction the Supreme

Court will affirm if there is substantial evidence to support the jury's verdict. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

Jurors.

Defendant's contention that a jury qualified to return a death penalty is necessarily prejudiced on the question of guilt or innocence was not supported where he was convicted of a lesser charge. *Rodgers v. State*, 261 Ark. 293, 547 S.W.2d 419 (1977).

The defendant's motion that prospective jurors who were opposed to the death penalty not be excused from serving on the jury was properly denied since these jurors would under no circumstances consider imposing the death penalty. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Exclusion of veniremen because of their uncertainty about, or scruples against, the death penalty held to be proper. *Woodard v. State*, 273 Ark. 235, 617 S.W.2d 861, cert. denied, 454 U.S. 1068, 102 S. Ct. 618, 70 L. Ed. 2d 603 (1981); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982); *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Selection of a jury which agreed in advance to consider the death penalty held proper. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982), cert. denied, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

The law of Arkansas permits prospective jurors to be challenged if they would automatically vote for the death penalty upon conviction regardless of the evidence. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd as modified, 758 F.2d 226 (8th Cir. 1985) rev'd on other grounds sub nom. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

Argument of defendant that he was denied an impartial jury because the jury selected was "death qualified" and therefore was biased in favor of the prosecution was rejected. *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662, cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173

(1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Defendant was not prejudiced where venireman stated that he had not formed an opinion about capital punishment before the voir dire began, but he had decided that he believed in it under certain circumstances. *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

Exclusion for cause of two veniremen because of their uncertainty as to capital punishment, and failure to excuse for cause a venireman who showed a preference for capital punishment, did not constitute abuse of discretion. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Death-qualified juries held to be constitutional. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984); *Harmon v. State*, 286 Ark. 184, 690 S.W.2d 125 (1985); *Sullivan v. State*, 287 Ark. 6, 696 S.W.2d 709 (1985).

Jurors who are unalterably opposed to capital punishment should not be permitted to participate in the determination of guilt or innocence in capital cases and their exclusion is proper, for either of two reasons; first, because conviction-proneness is neither inherently wrong nor destructive of the juror's impartiality, and second, because a jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment; that is as it should be, for the two questions are necessarily interwoven. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

A juror who would require the prosecutor to prove more elements than the law requires because of the severity of the death penalty was properly struck for cause. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

It is not error to empanel a death-qualified jury. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

Defendant was not denied a fair trial because several jurors were dismissed due to their scruples against the death penalty. *Snell v. State*, 287 Ark. 264, 698 S.W.2d 289 (1985).

Where the trial judge's determination that three prospective jurors were impartial was fairly supported by the record, and none of the three served on the jury as the defendant exercised his peremptory challenges to excuse them, the defendant was not entitled to relief on the grounds that the trial court had refused to excuse those prospective jurors for cause. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), reinstated on reh'g, 915 F.2d 372 (8th Cir. 1990).

The proper standard to be used in releasing a juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. Since Arkansas recognizes the death penalty, jurors in a capital murder case must be able to consider imposing a death sentence if they are to perform their function as jurors; the trial court correctly decided that those excused jurors could not perform their duties, because they could not consider imposing a death sentence. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

Where the juror reported to the trial judge that he had received a telephone call during the preceding night to "do good," the trial court properly refused to grant a mistrial; the judge was in a far better position than the appellate court to say whether the particular juror was affected by the telephone call. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

If the question on the juror's mind is the ultimate one of whether the accused is guilty, then that juror is expressing a reasonable doubt, and the verdict is not unanimous; therefore, where, in a capital murder trial, the jurors were polled as to their guilty verdicts and one juror responded that his verdict was with a question, the defendant's conviction was re-

versed. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Lesser Included Offenses.

When capital felony murder is charged under this section, first-degree murder is a "lesser included offense" because the same evidence used to prove the former of necessity proves the latter. Therefore, an instruction on first-degree murder is required. *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990).

Premeditated and deliberate capital murder includes the lesser charge of purposeful first degree murder. *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992).

Second-degree murder is not a lesser-included offense of capital felony murder. *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Second-degree murder is a lesser-included offense of capital murder only if the accused's mental state is an element of the offense. *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Evidence was insufficient to require the court to give a instruction on manslaughter as a lesser included offense of murder, notwithstanding that the defendant's divorce from the victim's daughter may have aroused unbalancing passion within the defendant, where there was no evidence of provocation. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000).

Felony manslaughter is not a lesser included offense of capital felony murder or first-degree felony murder. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Felony manslaughter added an additional element to felony murder relating to the perpetration of the murder itself and, therefore, was not a lesser-included offense of capital murder or first-degree murder. *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002).

Trial court did not err in declining to give defendant's proffered first-degree murder instruction that the state was

required to prove a purposeful intent to kill because the requirement that an act be done "purposely" in subdivision (a)(1) referred only to the act of discharging a firearm. *Hardman v. State*, 356 Ark. 7, 144 S.W.3d 744 (2004).

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The court looked at the totality of the circumstances surrounding the interrogation and determined that the State proved that the defendant had the requisite level of comprehension to knowingly waive his rights. *Steggall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000).

Where there was no testimony presented to indicate that incarcerated defendant made incriminating statements as a result of violence, threats, coercion or offers of reward, and the testimony presented established that defendant's custodial statements that he intended to kill the assaulted corrections officer were spontaneous, the statements were admissible in defendant's trial for attempted capital murder. *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002).

Premeditation and Deliberation.

Evidence held sufficient to show premeditation and deliberation supporting a conviction. *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989); *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990); *Catlett v. State*, 331 Ark. 270, 962 S.W.2d 313 (1998).

Premeditation and deliberation can be instantaneous and the intent to kill need not have existed for any appreciable length of time and may also be conceived in a moment. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Premeditation and deliberation and intent may all be inferred from the circumstances, such as the character of the weapon used, the manner in which it is used, the nature, extent and location of the wounds inflicted, the conduct of the accused and the like. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978); *Farris v. State*, 308 Ark. 561, 826 S.W.2d 241 (1992).

Deliberation and premeditation may be

inferred from the circumstances of the case as presented at trial. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

Defendant was guilty of capital murder if premeditation and deliberation were found, but if a lesser culpable state were found, then a finding of second-degree murder or manslaughter was appropriate. *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981).

Premeditation and deliberation are not required to exist for any particular length of time and may be formed almost on the spur of a moment. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

The matter of premeditation and deliberation, absent a confession, can only be proven by circumstantial evidence. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

The rule that the requisite state of mind of premeditation and deliberation need not exist for any particular length of time is still law. *Fields v. State*, 280 Ark. 153, 655 S.W.2d 419 (1983).

Breaking into the victims' house, ransacking the house, raping one of the victims, and then inflicting numerous, deep, and fatal stabs wounds with a large knife upon three different victims is substantial circumstantial evidence of a premeditated and deliberated culpable mental state. *Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989).

Under § 5-3-201 and this section, premeditation and deliberation constitute the necessary mental state for the commission of attempted capital murder. *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990).

Where evidence established that defendant armed himself with a sawed-off shotgun, drove to the housing projects, walked to within six feet of the victim at an angle from which the victim couldn't see, spoke the victim's name, and shot the victim in the side of the head, these circumstances provided more than substantial evidence for the jury to infer defendant's premeditation and deliberation. *Smith v. State*, 306 Ark. 483, 815 S.W.2d 922 (1991).

Capital murder conviction affirmed where defendant shot, raped, and killed an 85-year-old woman before taking \$25

from her purse. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Evidence of premeditation and deliberation held sufficient where defendant had talked about killing the victim for some months before the murder, and where victim had been shot with a pump shotgun and two different types of shells had been fired. *Lloyd v. State*, 332 Ark. 1, 962 S.W.2d 365 (1998).

Premeditation and deliberation were sufficiently shown where the defendant shot the victims in the head with a firearm, causing their deaths. *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998).

The evidence was sufficient to show premeditation and deliberation in the defendant's killing of his brother, notwithstanding the contention that there was no eyewitness to the incident and that the only testimony on the point at trial was given by the defendant and showed that his brother initiated the fight and that the defendant only defended himself against his brother's attack, where evidence showed that the brother sustained 21 sharp object wounds and 58 blunt object blows and that he also suffered defense wounds consistent with a person holding up his arms to ward off an attacker. *Chase v. State*, 334 Ark. 274, 973 S.W.2d 791 (1998).

Because intent can rarely be proved by direct evidence, a jury may infer premeditation and deliberation from circumstantial evidence such as the type and character of the weapon used, the manner in which the weapon was used, the nature, extent, and location of the wounds inflicted, and the conduct of the accused. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999), cert. denied, 528 U.S. 933, 120 S. Ct. 334, 145 L. Ed. 2d 261 (1999).

The necessary premeditation and deliberation is not required to exist for a particular length of time and may be formed in an instant. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999), cert. denied, 528 U.S. 933, 120 S. Ct. 334, 145 L. Ed. 2d 261 (1999).

Evidence was sufficient to show premeditation and deliberation where (1) while in a car shortly before his death, the victim was asked either by the defendant or by a copерpetrator in the defendant's presence how it felt to know that he was going to die, and (2) the victim's death was

the culmination of two prolonged beatings and torture. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999), cert. denied, 528 U.S. 933, 120 S. Ct. 334, 145 L. Ed. 2d 261 (1999).

Premeditation is not required to exist for a particular length of time; it may be formed in an instant and is rarely capable of proof by direct evidence but must usually be inferred from the circumstances of the crime. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

Premeditation and deliberation may be inferred from the type and character of the weapon, the manner in which the weapon was used, the nature, extent, and location of the wounds, and the accused's conduct. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000).

The evidence was sufficient to show that defendant acted with premeditation and deliberation when he went to the victim's home with a recently purchased gun, shot the unarmed victim in the back, causing him to suffer paralysis, and then shot him a second time at point-blank-range in the chest and left him to die. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000).

Where incarcerated defendant grabbed correction officer's flashlight and inflicted repeated blows to the officer's head causing permanent brain injury, the vicious nature of the attack alone could allow the jury to infer premeditation and deliberation to support defendant's attempted capital murder conviction. *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002).

Where the medical examiner testified that the victim was lying on a couch and didn't have time to move or react, and evidence showed that there was more than an instant for defendant to decide to kill the victim, leave the room to get a gun, return to the room, aim at the victim, and shoot several times, this was sufficient to show premeditation and deliberation under subdivision (a)(4) of this section. *Robinson v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 573 (Oct. 6, 2005).

Sentence.

Punishment of life imprisonment held not to have resulted from passion or prejudice or jury's abuse of its discretion and the sentence was not so wholly disproportionate to the crime as to shock the moral sense of the community. *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978).

Where the defendant was convicted of two felony murders and received the death sentence in each, as authorized by statute for each offense, it was not so disproportionate to the nature of the offense as to shock the moral sense of the community. *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978).

Evidence held sufficient to find that defendant's sentence should be reduced from death to life without parole. *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419, cert. denied, 464 U.S. 835, 104 S. Ct. 121, 78 L. Ed. 2d 119 (1983).

The death sentences were carefully and deliberately compared to sentences in other capital cases, and it was found that the death penalty was fully justified. *Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983).

Juries are not bound under the Arkansas statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances; whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death; additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Death penalty held not wantonly, arbitrarily or freakishly imposed, and held not excessive in relation to the crime and the jury's verdict held relatively free of passion or prejudice. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

Imposition of death sentence as compared to other capital cases held not to be arbitrary. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), cert. denied, 466 U.S. 988, 104 S. Ct. 2370, 80 L. Ed. 2d 842 (1984).

Evidence held sufficient to find that the trial court should reject the defendant's argument that the death sentence is dis-

proportionate. *Hendrickson v. State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

Where, when the jury asked the court whether a sentence of life without parole "really means no parole," and the court answered, by agreement of counsel for the defense and for the state, that under a sentence of life without parole the defendant would be incarcerated for life in the Department of Correction unless the governor commuted the sentence to a term of years, the defendant could not argue on appeal that it was error to give this information to the jury. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied, 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Where the mandated narrowing function was performed at the guilt phase, the fact that the aggravating circumstance duplicated one of the elements of the crime did not make the sentence constitutionally infirm. *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

Single Continuous Transaction.

Where a murder and robbery occur in close proximity to one another in time and place, the jury is justified in finding the murder and robbery to be one continuous transaction. *Mitchell v. State*, 314 Ark. 343, 862 S.W.2d 254 (1993).

The state need only prove that a robbery and murder were parts of the same transaction, or occurred within the same brief interval, to support a conviction of capital felony murder and need not show a strict causal relationship between the felony and the homicide. *Clay v. State*, 324 Ark. 9, 919 S.W.2d 190 (1996).

Evidence sufficient to find that murder and robbery occurred together. *Clay v. State*, 324 Ark. 9, 919 S.W.2d 190 (1996).

Trial Proceedings.

The late disclosure of the identity of the individual whose phone call led to the discovery of the body of one of the murder victims did not preclude the defense counsel from preparing properly for trial where the counsel failed to disclose how the identity of the caller would have been used if it had been known before the trial. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), reinstated on reh'g, 915 F.2d 372 (8th Cir. 1990).

Where, before the voir dire had begun in a capital murder trial, a roll call of the expected witnesses showed that one witness for the state had not yet arrived and a deputy prosecutor remarked: "I don't know what's happened to him unless he's gotten killed," a mistrial was properly denied because the remark was just a comment that had nothing to do with the trial and did not impute anything to anyone. *Holland v. State*, 288 Ark. 435, 706 S.W.2d 375 (1986).

Where, in a capital murder prosecution, evidence indirectly showing that the defendant was in the penitentiary was admissible, it was not error for the prosecutor to have mentioned it in his opening statement. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Due to the jury's verdict of guilt only as to second degree murder, defendant was not prejudiced by an asserted error in the trial court's denial of motions for directed verdict on capital murder charges. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Both the capital murder conviction and the death penalty sentence held invalid and set aside. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

Where the evidence of a premeditated and deliberated murder was overwhelming, the trial court's error was harmless. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994).

Joint trial of capital murder defendants upheld where joint trial was lengthy, lasting seventeen days, and perhaps separate trials would have taken twice as long and required twice as many jurors; the evidence was not difficult for the jury to segregate; the evidence was not significantly stronger against one defendant than the other; the testimony of one did not compel the other to testify; there was no significant disparity in criminal records of the defendants; and the trial judge thought the jurors could distinguish the evidence and apply the law intelligently to each offense and to each defendant. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

In defendant's trial for capital murder, the trial court erred in refusing to allow defendant to exercise all his peremptory

challenges against certain Caucasian jurors where the State did not prove purposeful discriminatory intent; thus, reversal in regard to the Batson error was required. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

Underlying Felony.

It was not improper to charge a defendant with capital felony murder with aggravated robbery as the underlying felony although subsection (a) only lists "robbery" as one of felonies that can support such a charge, since the General Assembly could not conceivably have intended that robbery, which may involve no force, would support a charge of capital murder, while aggravated robbery, an inherently dangerous crime, would not. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981); *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988).

Testimony held sufficient evidence to support the robbery allegation as the underlying felony to capital murders. *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 688 (1983).

The evidence of underlying felony held sufficient to support a conviction for capital felony murder. *Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985); *Findley v. State*, 300 Ark. 265, 778 S.W.2d 624 (1989).

To prove capital murder the state must first prove the felony, so the felony becomes an element of the murder charge; because it is an essential element, a defendant cannot be tried separately for these crimes or punished for both. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989).

For the phrase "in the course of and in furtherance of the felony" to have any meaning, the underlying felony must have an independent objective which the murder facilitates. Burglary committed when defendant chased the victim into the victim's home before killing him could not serve as the underlying felony under subdivision (a)(1), since the intent to kill is what made the entry into the victim's home a burglary, and the burglary was no more than one step toward the commission of the murder and was not to facilitate the murder. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Subdivision (a)(2) (now subdivision

(a)(3)) requires no underlying felony and aggravated robbery is not a lesser included offense of attempted capital murder under subdivision (a)(2) (now subdivision (a)(3)). Where aggravated robbery was not the underlying felony of the defendant's attempted capital murder charge, conviction should not be set aside since the attempted capital murder charge was pursuant to subdivision (a)(2) (now subdivision (a)(3)) and not (a)(1). *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

The trial court should not have entered a judgment on conviction for aggravated robbery where aggravated robbery was the underlying felony relied upon by the state to establish the crime of capital murder. The robbery was an essential element of the crime of capital murder, and therefore the defendant could not have been sentenced for aggravated robbery. *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988).

Subdivision (a)(1) requires only one underlying felony to be merged into the capital murder conviction; it does not require that all other felonies charged at the same time be merged into the capital murder conviction. *Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989).

The crime of theft is not listed in the capital murder statute as an underlying offense which would support a capital murder charge. *Clements v. State*, 303 Ark. 319, 796 S.W.2d 839 (1990).

When capital felony murder is charged under this section, first-degree murder is a "lesser included offense" because the same evidence used to prove the former of necessity proves the latter. Therefore, an instruction on first-degree murder is required. *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990).

A defendant cannot be convicted of capital felony murder under subdivision (a)(1) of this section where the underlying predicate felony is burglary if the object of the burglary is murder. *Parker v. Lockhart*, 797 F. Supp. 718 (E.D. Ark. 1992).

Although the penetration of the vagina and anus of the victim caused injuries which contributed to the death of the victim, the rape could be used as the underlying felony to support a capital murder charge; penetration of the vagina or anus of a person was not an act which was subsumed by the murder as the pen-

etration was not necessary to cause the death. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

Though subdivision (a)(1) has been amended since 1988, aggravated robbery is a predicate felony for capital murder. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996).

Where trial court in capital felony murder case improperly submitted to the jury the issue of the underlying felony of first-degree escape, and the jury found defendant guilty of first-degree escape, defendant's conviction for capital felony murder was proper because it was supported by the jury's additional finding that defendant was guilty of the underlying felony of aggravated robbery, which issue was also submitted to the jury. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

Evidence was sufficient to prove defendant committed an aggravated robbery as the underlying felony on a capital murder charge under where the corpus delicti of the homicide was established by independent evidence and, therefore, the underlying felony could be shown by defendant's confession alone; further, the fact that defendant's friend wore a recording device for police did not render their conversation a custodial interrogation. *Hall v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 225 (Apr. 14, 2005).

Venue.

In a prosecution for capital murder where the victim was kidnapped in one county and murdered in another, venue was proper where the murder occurred. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

Where the pre-trial publicity in a capital murder prosecution consisted of primarily brief factual accounts of the events and many did not refer to the defendant in any manner, the relatively few items which appeared after the defendant was charged concerned the defendant's return from a psychiatric examination, pre-trial motions, and hearing on those motions, and where during the voir dire of prospective jurors, each juror stated that he had no opinion as to the guilt or innocence of defendant and that he would follow the judge's instructions, the pre-trial publicity

evidenced in the record was not so inflammatory that a wave of public passion against the defendant existed so as to prejudice his right to a fair trial; therefore, the motion for change of venue was correctly denied. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), reinstated on reh'g, 915 F.2d 372 (8th Cir. 1990).

Cited: *Rodgers v. State*, 261 Ark. 293, 547 S.W.2d 419 (1977); *Pickens v. State*, 261 Ark. 756, 551 S.W.2d 212, cert. denied, 435 U.S. 909, 98 S. Ct. 1459, 55 L. Ed. 2d 500 (1977); *Baysinger v. State*, 261 Ark. 605, 550 S.W.2d 445 (1977); *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980); *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980); *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981); *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1 (1981); *Woodard v. State*, 273 Ark. 235, 617 S.W.2d 861, cert. denied, 454 U.S. 1068, 102 S. Ct. 618, 70 L. Ed. 2d 603 (1981); *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied, 459 U.S. 882, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982); *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981); *Alexander v. Housewright*, 667 F.2d 556 (8th Cir. 1981); *Collins v. Lockhart*, 545 F. Supp. 83 (E.D. Ark. 1982); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Hall v. State*, 276 Ark. 245, 634 S.W.2d 115 (1982); *Rasmussen v. State*, 277 Ark. 238, 641 S.W.2d 699 (1982); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982); *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983); *Smith v. State*, 279 Ark. 68, 648 S.W.2d 490 (1983); *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983); *Rowe v. Lockhart*, 736 F.2d 457

(8th Cir. 1984); *Blue v. Housewright*, 739 F.2d 320 (8th Cir. 1984); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Hogan v. State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984); *Elmore v. State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985); *Pickens v. State*, 284 Ark. 506, 683 S.W.2d 614 (1985); *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985); *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985); *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985); *Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985); *Ginter v. Stallcup*, 641 F. Supp. 939 (E.D. Ark. 1986); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986); *Craft v. State*, 289 Ark. 466, 712 S.W.2d 303 (1986); *Singleton v. Lockhart*, 653 F. Supp. 1114 (E.D. Ark. 1986); *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987); *Simmons v. Lockhart*, 709 F. Supp. 1457 (E.D. Ark. 1989); 871 F.2d 1395 (8th Cir.); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989); *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990); *Williams v. State*, 303 Ark. 193, 794 S.W.2d 618 (1990); *Porter v. Lockhart*, 925 F.2d 1107 (8th Cir. 1991); *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991); *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992); *Smith v. State*, 308 Ark. 390, 824 S.W.2d 838 (1992); *Butler v. State*, 311 Ark. 334, 842

S.W.2d 435 (1992); *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995); *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995); *Catlett v. State*, 321 Ark. 1, 900 S.W.2d 523 (1995); *O'Neal v. State*, 321 Ark. 626, 907 S.W.2d 116 (1995), (decision under prior law); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Cox v. Norris*, 958 F. Supp. 411 (E.D. Ark. 1996); *Singleton v. Norris*, 108 F.3d 872 (8th Cir. 1997); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Bowden v. State*, 328 Ark. 15, 940 S.W.2d 494 (1997); *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997); *Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997); *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998); *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998); *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), aff'd, 322 F.3d 500 (8th Cir. 2003); *Jimenez v. State*, 83 Ark. App. 377, 128 S.W.3d 483 (2003); *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004).

5-10-102. Murder in the first degree.

(a) A person commits murder in the first degree if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in the furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life;

(2) With a purpose of causing the death of another person, the person causes the death of another person; or

(3) The person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the homicidal act's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct that could result in death or serious physical injury.

(c) Murder in the first degree is a Class Y felony.

History. Acts 1975, No. 280, § 1502; 1981, No. 620, § 10; A.S.A. 1947, § 41-1502; Acts 1987 (1st Ex. Sess.), No. 52, § 1; 1989, No. 856, § 2; 1991, No. 683, § 2.

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Constitutionality.

The overlapping nature of § 5-10-101 and this section do not render those statutes unconstitutional in their application. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d

739 (1981); *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988); *White v. State*, 298 Ark. 55, 764 S.W.2d 613 (1989); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, cert. denied, 502 U.S. 829, 112 S. Ct. 102, 116 L. Ed. 2d 72 (1991).

Capital murder statute and the first-degree murder statute are not vague, since they clearly set out what acts are prohibited and are not constitutionally infirm, even though they overlap, because there is no impermissible uncertainty in the definition of the offenses. *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Where the wording of the capital felony murder statute and the first-degree murder statute overlap, such overlapping is not unconstitutionally vague and the overall scheme is not unconstitutional. *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093, 102 S. Ct. 659, 70 L. Ed. 2d 631 (1981).

The capital murder statute, § 5-10-101, and the first-degree murder statute are not unconstitutionally vague even though they overlap in such a way that an accused may be charged with either crime for the same conduct. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

The overlap of § 5-10-101(a)(1) and subdivision (a)(1) of this section does not render them unconstitutionally vague, since they clearly set out what acts are prohibited and there is no impermissible uncertainty in the definition of the offenses. *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981), cert. denied, 456 U.S. 1008, 102 S. Ct. 2301, 73 L. Ed. 2d 1304 (1982).

The capital felony murder statute is not unconstitutional on the ground that it overlaps with the first-degree felony murder statute. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983).

Capital murder and first-degree murder statutes are constitutional. *Simpson v. State*, 278 Ark. 334, 645 S.W.2d 688 (1983).

The capital felony murder statute, § 5-10-101(a)(1), and the first-degree murder statute, subdivision (a)(1), are not void for vagueness because they overlap. *Owens v. State*, 283 Ark. 327, 675 S.W.2d 834 (1984).

Murder during the course of a felony may either be charged as capital or first-degree murder at the discretion of the state and this overlap is not unconstitutional under the void for vagueness doctrine. *Penn v. State*, 284 Ark. 234, 681 S.W.2d 307 (1984).

The overlap of § 5-10-101(a)(1) with subdivision (a)(1) of this section does not deprive the accused of due process and equal protection of the laws. *Cannon v. State*, 286 Ark. 242, 690 S.W.2d 725 (1985).

Both the capital murder statute, § 5-10-101, and this section clearly identify the conduct prohibited and unambiguously describe the applicable penalties, thus providing adequate notice; therefore, these sections are not unconstitutionally vague. *Simmons v. Lockhart*, 626 F. Supp. 872 (E.D. Ark. 1985), aff'd, 814 F.2d 504 (8th Cir. 1987), cert. denied, 485 U.S. 1015, 108 S. Ct. 1489, 99 L. Ed. 2d 717 (1988), reinstated on reh'g, 915 F.2d 372 (8th Cir. 1990), aff'd, 915 F.2d 372 (8th Cir. 1990).

Overlapping between "premeditation and deliberation" in the capital murder statute and "purpose" in the first degree murder statute does not render the two statutes void for vagueness. *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Ward v. State*, 308 Ark. 415, 827

S.W.2d 110, cert. denied, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed. 2d 79 (1992); *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997).

While § 5-10-101 and this section may appear to overlap on the degree of required intent, this does not render them unconstitutional due to vagueness or arbitrariness. *Van Pelt v. State*, 306 Ark. 624, 816 S.W.2d 607 (1991); *Simpson v. Lockhart*, 942 F.2d 493 (8th Cir. 1991).

Section 5-10-101 is not unconstitutionally vague nor does it deny a defendant equal protection because it overlaps with this section. *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), aff'd in part, rev'd in part, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995).

This section and the capital murder section, § 5-10-101, are not unconstitutionally vague, and any overlap in the two sections does not create a constitutional infirmity in the sections. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

Subdivision (a)(2) of this section is not void for vagueness, but merely broad enough to cover two situations in which a purposeful killing might occur. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

The phrase "causes the death of another person" in subdivision (a)(2) of this section is commonly understood to have a certain meaning and is not unconstitutionally vague. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993).

The overlapping of § 5-10-101(a)(4) and subdivision (a)(2) of this section does not constitute some sort of constitutional violation. *Buchanan v. State*, 315 Ark. 227, 866 S.W.2d 395 (1993).

This section does not unconstitutionally overlap with § 5-10-101. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

This section is not unconstitutional for failure to adequately distinguish between those people for whom death is appropriate and those for whom it is not because § 5-4-603 narrows the death-eligible class at the sentencing phase. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997).

There is no unconstitutional overlap in the definition of capital felony murder and the definition of first-degree felony murder provided in this section. *Jones v.*

State, 328 Ark. 307, 942 S.W.2d 851 (1997).

The 1989 version of subdivision (a)(2) of this section, which referred to causing the death of "any person," while acting with a purpose to cause the death of "another person," was not unconstitutionally vague or overbroad. *Hubbard v. State*, 334 Ark. 321, 973 S.W.2d 804 (1998).

Construction.

The reference in subdivision (a)(1) of this section to "a felony" was not meant to exclude the felonies specified in § 5-10-101. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

Accomplice.

There was sufficient proof defendant assisted in the commission of murder, kidnapping and attempted murder, where there was testimony he drove car in which victims were confined, assisted in confining them, and encouraged shootings of the victims. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

Trial court properly denied defendant's motion for a directed verdict even though the state medical examiner stated that he could not determine the order in which each of the shots was fired or which shooter (defendant or accomplice) fired each of the 13 gunshots; there was no distinction between principals and accomplices, each was an accomplice and criminally liable for the conduct of both. *Tillman v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 722 (Nov. 17, 2005).

Aggravating Circumstances.

There is no distinction based upon the finding of aggravating circumstances between capital murder under § 5-10-101 and murder in the first degree under this section since neither section makes aggravating circumstances an element of the offense; thus, there is no need to make a finding of some aggravating circumstances in order to sustain a conviction for capital murder. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

Assistance of Counsel.

Where the defendant, who had been interrogated for several hours, requested a lawyer, and the police asked her who she wanted to call, but when she did not answer, continued the interrogation, all statements made by the defendant after

she requested counsel should have been excluded, and her conviction for the murder of her son was reversed. *Hughes v. State*, 289 Ark. 522, 712 S.W.2d 308 (1986).

Burden of Proof.

Where murder in the first degree was charged to have been committed in either of two ways, proof of one would not sustain the charge of the other. *Rayburn v. State*, 69 Ark. 177, 63 S.W. 356 (1901) (decision under prior law).

In homicide cases, the state had to prove the corpus delicti, which meant that it had to prove beyond a reasonable doubt that deceased was in fact killed and that deceased came to his death by the act of someone other than himself. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959) (decision under prior law).

Nothing in either § 5-10-101 or this section relieves the state of proving each element necessary to constitute a higher degree of culpability than the first-degree murder statute in trying a case under the capital murder statute, and nothing relieved the state of the absolute burden of proving each element of the offense beyond a reasonable doubt. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981).

It is not a denial of due process for the state to place on the defendant the burden of proof by a preponderance of the evidence of an affirmative defense which negates an element of the crime. *Hobgood v. Housewright*, 698 F.2d 962 (8th Cir. 1983).

Defenses.

One who, while in the actual perpetration of a felony by violence, killed another attempting to prevent the felony could not plead self-defense. *Spear v. State*, 184 Ark. 1047, 44 S.W.2d 663 (1931) (decision under prior law).

Jury was entitled to determine issue of self-defense in murder trial. *Long v. State*, 223 Ark. 387, 266 S.W.2d 66 (1954) (decision under prior law).

Where a man was assaulted with a murderous intent, he was under no obligation to retreat but could stand his ground and if need be, kill his adversary; however a requested instruction to the effect that a person viciously assaulted by another is not required to retreat was properly refused where the words "murderous intent" were not used therein.

Seward v. State, 228 Ark. 712, 310 S.W.2d 239 (1958) (decision under prior law).

Instruction as to self-defense which appeared in last sentence in instruction "if, however, the assault is so fierce as to make it, apparently, as dangerous for him to retreat as to stand, it is not his duty to retreat, but he may stand his ground, and, if necessary to save his own life, or to prevent a great bodily injury, slay his assailant" was sufficient. Seward v. State, 228 Ark. 712, 310 S.W.2d 239 (1958) (decision under prior law).

Evidence held sufficient to negate claim of self-defense. Seward v. State, 228 Ark. 712, 310 S.W.2d 239 (1958) (decision under prior law); Girtman v. State, 285 Ark. 13, 684 S.W.2d 806 (1985).

Voluntary intoxication could not have the effect of reducing the degree of homicide unless it was accompanied by a temporary destruction of the reason. Young v. State, 230 Ark. 737, 324 S.W.2d 524 (1959) (decision under prior law).

While defendant in murder prosecution did plead self-defense or justification, such plea did not permit the state to offer evidence of specific instances of prior misconduct to show she may have been the aggressor because her character was not an essential element of her claim of self-defense. Rowdean v. State, 280 Ark. 146, 655 S.W.2d 413 (1983).

Voluntary intoxication is a defense to specific intent crimes if the defendant's drunkenness negated the required intent; thus, since murder requires culpability, the defense would be available for a murder charge. David v. State, 286 Ark. 205, 691 S.W.2d 133 (1985).

Where defendant was not at his own home and was by all accounts standing outside when he commenced the shooting, and defendant failed to proffer an instruction with a complete statement of the law regarding the use of deadly force only if retreat was not possible, the trial court did not err in declining to give an instruction on self-defense. Ghoston v. State, 84 Ark. App. 387, 141 S.W.3d 907 (2004).

Degree of Offense.

The homicide statutes do not confer arbitrary power upon prosecutors and juries to select between capital murder and murder in the first degree. Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980).

Double Jeopardy.

A former acquittal for seduction would not have precluded a trial for the killing of an unborn quick child, though the woman involved in each case was the same and the same general testimony might be adduced at the trial. Young v. State, 176 Ark. 170, 2 S.W.2d 14 (1928) (decision under prior law).

The acquittal of a defendant on a charge of willful murder in the course of an armed robbery where the facts reflected that the jury could not have found defendant present at the crime scene without having been obligated to find him guilty of murder, even if it believed he did not actually fire the fatal shot, prevented a subsequent trial of the defendant on a charge of armed robbery arising from the same set of facts under the constitutional guarantees against double jeopardy. Turner v. Arkansas, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972) (decision under prior law).

Since defendant was convicted of rape and attempted first degree murder, and rape and attempted first degree murder are separate and distinct offenses and each requires proof of a fact which the other does not, the convictions for rape and attempted first degree murder did not violate the double jeopardy clause. Wiman v. Lockhart, 797 F.2d 666 (8th Cir. 1986), cert. denied, 479 U.S. 1021, 107 S. Ct. 678, 93 L. Ed. 2d 728 (1986).

The double jeopardy clause and subsection (a) and subdivision (b)(1) of § 5-1-110 did not preclude the defendant's convictions of both attempted first degree murder and aggravated robbery, where the defendant held the first victim at gunpoint and examined her jewelry with the purpose of committing a theft, and then he shot the second victim. Kinsey v. State, 290 Ark. 4, 716 S.W.2d 188 (1986), cert. denied, 479 U.S. 1021, 107 S. Ct. 678, 93 L. Ed. 2d 728 (1986).

Evidence.

Evidence held sufficient to support conviction. King v. State, 68 Ark. 572, 60 S.W. 951 (1901); Jones v. State, 102 Ark. 195, 143 S.W. 907 (1912); Delaney v. State, 212 Ark. 622, 207 S.W.2d 37 (1948); Black v. State, 215 Ark. 618, 222 S.W.2d 816 (1949), cert. denied, 338 U.S. 956, 70 S. Ct. 490, 94 L. Ed. 590 (1950); Long v. State, 223 Ark. 387, 266 S.W.2d 66 (1954);

Hays v. State, 230 Ark. 731, 324 S.W.2d 520 (1959); Young v. State, 230 Ark. 737, 324 S.W.2d 524 (1959); Moore v. State, 231 Ark. 672, 331 S.W.2d 841 (1960); Shipman v. State, 252 Ark. 285, 478 S.W.2d 421 (1972); Smith v. State, 256 Ark. 321, 507 S.W.2d 110 (1974); Robertson v. State, 256 Ark. 366, 507 S.W.2d 513 (1974); Witham v. State, 258 Ark. 541, 527 S.W.2d 905 (1975) (preceding decisions under prior law); White v. State, 266 Ark. 499, 585 S.W.2d 952 (1979); Titus v. State, 268 Ark. 9, 593 S.W.2d 164 (1980); Bly v. State, 267 Ark. 613, 593 S.W.2d 450 (1980); Williamson v. State, 277 Ark. 52, 639 S.W.2d 55 (1982); Long v. State, 280 Ark. 327, 657 S.W.2d 551 (1983); Girtman v. State, 285 Ark. 13, 684 S.W.2d 806 (1985); Mayer v. State, 285 Ark. 73, 685 S.W.2d 143 (1985); Mason v. State, 285 Ark. 479, 688 S.W.2d 299 (1985); Sims v. State, 286 Ark. 476, 695 S.W.2d 376 (1985); Williams v. State, 289 Ark. 69, 709 S.W.2d 80 (1986); Thomerson v. Lockhart, 835 F.2d 1257 (8th Cir. 1987); Harris v. State, 291 Ark. 504, 726 S.W.2d 267 (1987); Williams v. State, 294 Ark. 345, 742 S.W.2d 932 (1988); Bennett v. State, 297 Ark. 115, 759 S.W.2d 799 (1988); Thomas v. Swanson, 881 F.2d 523 (8th Cir. 1989); Hall v. State, 299 Ark. 209, 772 S.W.2d 317 (1989); Hill v. State, 299 Ark. 327, 773 S.W.2d 424 (1989); Williams v. State, 300 Ark. 84, 776 S.W.2d 359 (1989); Tillman v. State, 300 Ark. 132, 777 S.W.2d 217 (1989); Mulanax v. State, 301 Ark. 321, 783 S.W.2d 851 (1990); Starling v. State, 301 Ark. 603, 786 S.W.2d 114 (1990); Cherry v. State, 302 Ark. 462, 791 S.W.2d 354 (1990); Richmond v. State, 302 Ark. 498, 791 S.W.2d 691 (1990); McKinney v. State, 303 Ark. 257, 797 S.W.2d 415 (1990); Pomerleau v. State, 303 Ark. 275, 795 S.W.2d 929 (1990); Black v. State, 306 Ark. 394, 814 S.W.2d 905 (1991); Smith v. State, 308 Ark. 390, 824 S.W.2d 838 (1992); Coleman v. State, 315 Ark. 610, 869 S.W.2d 713 (1994); Akbar v. State, 315 Ark. 627, 869 S.W.2d 706 (1994); Banks v. State, 315 Ark. 666, 869 S.W.2d 700 (1994); Galvin v. State, 323 Ark. 125, 912 S.W.2d 932 (1996); Walker v. State, 324 Ark. 106, 918 S.W.2d 172 (1996); Booker v. State, 335 Ark. 316, 984 S.W.2d 16 (1998); Thompson v. State, 338 Ark. 564, 999 S.W.2d 192 (1999); Terrell v. State, 342 Ark. 208, 27 S.W.3d 423 (2000); Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001); Leaks v. State,

345 Ark. 182, 45 S.W.3d 363 (2001); Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001).

Circumstantial evidence would sustain a conviction for murder in the first degree. Culbreath v. State, 96 Ark. 177, 131 S.W. 676 (1910) (decision under prior law) Bennett v. State, 297 Ark. 115, 759 S.W.2d 799 (1988), cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990); Scott v. State, 303 Ark. 197, 795 S.W.2d 353 (1990).

Evidence held insufficient to support conviction. McClendon v. State, 197 Ark. 1135, 126 S.W.2d 928 (1939); Nichols v. State, 280 Ark. 173, 655 S.W.2d 450 (1983); Hallman v. State, 288 Ark. 454, 706 S.W.2d 387 (1986); Midgett v. State, 292 Ark. 278, 729 S.W.2d 410 (1987).

Circumstantial evidence held sufficient to support a finding that defendant committed the murder. Murry v. State, 276 Ark. 372, 635 S.W.2d 237 (1982); Dixon v. State, 311 Ark. 613, 846 S.W.2d 170 (1993); Carter v. State, 324 Ark. 395, 921 S.W.2d 924 (1996).

Photographs of deceased held admissible. Fuller v. State, 278 Ark. 450, 646 S.W.2d 700 (1983); Smith v. State, 282 Ark. 535, 669 S.W.2d 201 (1984); Parker v. State, 290 Ark. 158, 717 S.W.2d 800 (1986).

Testimony held admissible to show motive and intent. Wood v. State, 280 Ark. 248, 657 S.W.2d 528 (1983); Shankle v. State, 309 Ark. 40, 827 S.W.2d 642 (1992).

Trial judge properly permitted introduction of statements made by defendant before he had been given the Miranda warnings where the officers did not even know if a killing had occurred, but trial judge properly excluded statement made after defendant said he wanted to talk to a lawyer. Futch v. State, 288 Ark. 323, 705 S.W.2d 11 (1986).

Testimony held admissible to disprove defendant's alibi. Taylor v. State, 288 Ark. 456, 706 S.W.2d 384 (1986).

The defendant's reference on the witness stand to his refusal to talk without obtaining legal advice was not analogous to the prosecution mentioning an accused's refusal to testify on his own behalf. Dix v. State, 290 Ark. 28, 715 S.W.2d 879 (1986).

In prosecution for first degree murder, the trial judge did not abuse his discretion in admitting the statement of the murder

victim that she had been shot even though it was not disputed that she had been shot; the defendant could not prevent the introduction of relevant evidence simply by stipulating to a fact. *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987), cert. denied, 493 U.S. 896, 110 S. Ct. 247, 107 L. Ed. 2d 197 (1989).

Inflammatory photographs may be admitted if they tend to shed light on any issue or if they are useful in assisting the jury in understanding testimony. *Williams v. State*, 300 Ark. 84, 776 S.W.2d 359 (1989).

Evidence was sufficient to sustain the conviction for knowingly causing the death of a person fourteen (14) years of age or younger under circumstances manifesting cruel and malicious indifference to the value of human life. *Porter v. State*, 308 Ark. 137, 823 S.W.2d 846 (1992).

Circumstantial evidence held sufficient to support conviction. *Smith v. State*, 314 Ark. 448, 863 S.W.2d 563 (1993).

Circumstantial evidence sufficient to show that defendant acted with the purposeful intent to kill. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

The nature of the weapon used, and the manner of its use, were such that the evidence of defendant's purpose was sufficient. *Harris v. State*, 314 Ark. 379, 862 S.W.2d 271 (1993).

Conviction of first-degree murder for the murder and rape of a seven-month-old child upheld. *Kinney v. State*, 315 Ark. 481, 868 S.W.2d 463 (1994).

The testimony of one witness that defendant spoke earlier of killing the woman he was living with, the testimony of gun dealer that defendant purchased five shotgun shells the afternoon of the murder, and the fact that defendant had the loaded shotgun at his side when he entered the house was sufficient to support his conviction for the first-degree murder of his girlfriend. *McArty v. State*, 316 Ark. 35, 871 S.W.2d 346 (1994).

Evidence held sufficient to sustain a conviction for first degree murder based on accomplice liability. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994).

Evidence of shooting held sufficient to support first degree murder conviction. *Robinson v. State*, 318 Ark. 33, 883 S.W.2d 469 (1994).

The evidence that defendant stabbed victim purposefully causing his death was

overwhelming. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

Evidence held sufficient to support conviction where there was substantial evidence the defendant purposely aided and facilitated his accomplices in the commission of first-degree murder. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

The court erred in admitting into evidence a previous violent incident involving the defendant where there was no logical connection between the previous acts and the crime presently charged, although this error was harmless given the other admissible evidence of defendant's intent to commit murder. *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996).

Evidence held sufficient to sustain defendant's conviction as an accomplice to first-degree murder where both the defendant and a codefendant testified that an accomplice carried a .38-caliber handgun on the night of the murder, and expert testimony indicated that the bullets recovered from the victim were fired from such a weapon. *Matthews v. State*, 56 Ark. App. 141, 940 S.W.2d 498 (1997).

Evidence held sufficient to show that defendant struck and shook the child knowing that the result could be serious injury or death. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997).

Evidence held sufficient to show that defendant's actions were done with the purpose of causing serious physical injury to another person which resulted in the death of the victim. *Moore v. State*, 58 Ark. App. 120, 947 S.W.2d 395 (1997).

Evidence that wife beat her husband to death in their apartment held sufficient. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

Evidence of the numerous blunt-force injuries to the victim's skull, as well as the autopsy evidence that she was strangled, demonstrated that defendant acted with the purpose to cause the victim's death. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

Evidence was sufficient to show that the defendant acted knowingly in causing the death of his girlfriend's seven-month-old son where (1) the medical testimony of the physicians who treated the child presented uncontroverted evidence of child maltreatment, particularly from descrip-

tions of blunt force trauma causing a skull fracture and brain swelling and hemorrhage leading to the child's death; (2) the radiological studies indicated that the life-threatening injuries occurred during the time in which the defendant was the only caregiver of the child; and (3) the intensive care physician testified that he was "100 percent certain" that the brain injury occurred within an hour of the child's arrival at the hospital. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999), overruled in part on other grounds, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

The defendant was properly convicted of first degree murder, rather than manslaughter, notwithstanding his contention that he shot the victim under the influence of extreme emotional disturbance for which there was reasonable excuse, where (1) after having sex with the victim in his car and leaving the area, the defendant discovered that his wallet was missing, (2) the defendant went back to the area and found his wallet on the ground, with cash missing, (3) the defendant went home, got his gun and then found the victim and accused her of taking his money, (4) she stated that she did not have his money and taunted him, saying that she did not believe he would shoot her, and (5) the defendant then shot her three times. *Franks v. State*, 342 Ark. 167, 27 S.W.3d 377 (2000).

Where evidence showed that there was a history of domestic abuse and threats, that defendant had a knife, a pair of handcuffs, duct tape, a leatherman-type tool, and gloves when he was arrested, and that defendant told the unavailable officer that defendant intended to tie the victim up and kill her, the state had no direct evidence of defendant's intent to commit murder without the improperly admitted testimony of the unavailable officer. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Where the evidence presented showed that: (1) defendant had a stormy relationship with the victim; (2) they argued the night before a fatal shooting; (3) defendant had pointed a gun at the victim in the past; (4) defendant had retrieved a gun on the morning of the shooting; (5) and defendant admitted to shooting the victim, there was sufficient evidence to sustain a conviction for first-degree murder; the evidence was sufficient to show

defendant acted purposely, rather than accidentally. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003).

Based on the testimony of several eyewitnesses that defendant had shot a victim near a vehicle after an argument, there was sufficient evidence presented to infer that defendant acted with a conscious desire to kill the victim. *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003).

Sufficient evidence existed to affirm the jury's conclusion that the defendant killed his step-sister, who was residing with the defendant and his wife, based on the defendant's changing his story from the victim's leaving the defendant's home to go to unknown whereabouts to the victim being accidentally killed in a struggle over a rifle with the defendant in his home when she threatened him with the gun, the blood stains found in the home which contradicted the defendant's version of what happened, and the victim's arms being too short to have pulled the trigger and hit herself in the head with a bullet. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

In a murder trial, the officer was not offered as an expert and his testimony on rebuttal, regarding the amount of blood loss in similar cases, was rationally based on the officer's years of experience as a homicide investigator and, therefore, the testimony was admissible as a lay opinion. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003).

Because the decedent's character was not an essential element of a self-defense for first-degree murder, the trial court did not abuse its discretion in ruling that proffered testimony regarding the decedent's specific instances of violent conduct was not admissible under Ark. R. Evid. 405(b). *Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003).

Where defendant, on cross-examination, had questioned the witness about the witness's felony record in order to imply that the witness had recently fabricated his denial that defendant shot the decedent in self-defense, the state was certainly entitled, under Ark. R. Evid. 801(d)(1)(ii), to rebut the allegation with evidence that the witness had made the same statement about the shooting being in "cold blood" immediately after the offense and before the motive for fabrication

came into existence. *Anderson v. State*, 354 Ark. 102, 118 S.W.3d 574 (2003).

Defendant's conviction and sentence for capital murder were affirmed and the trial court properly denied defendant's motion pursuant to suppress statements made while in police custody, as the statements in question were voluntary and were not coerced. *Pilcher v. State*, 355 Ark. 369, 136 S.W.3d 766 (2003).

There was sufficient evidence to support the verdict finding the first defendant guilty of first-degree murder where (1) the first defendant gave two recorded statements in which she admitted to being at the crime scene, (2) in one of her statements, the first defendant told the police that she intended to kill the victim but was unable to muster the strength and that she handed the murder weapon to the second defendant after he stated that he would kill the victim, thus, confessing to either murdering or aiding in the murder of the victim, and (3) the victim died as a result of a homicide. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Evidence was sufficient for conviction of first-degree murder where the victim was last seen in the company of defendant, defendant made statements to his fellow inmates that he had killed the victim with his hands in a fight after an argument, defendant told his brother that he would like to kill the victim, the victim's body was placed on wood burning stove, defendant kicked the pipe off of the stove, and the victim's body was found charred. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

It was not error to admit autopsy photographs of the victim and the condition in which he was found because the medical examiner could not pinpoint a cause of death, and he testified that the photographs would be helpful to the jury in showing why the cause of death was difficult to determine and to more fully explain the damage from the fire to the victim; the trial court properly weighed the potential prejudice against the probative value of the photographs. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

Even if defendant's sufficiency of the evidence argument been preserved, the appellate court would have found that the evidence supporting the verdict of guilty of attempted first-degree murder and fil-

ing a false report was substantial where defendant reported her child as missing but later told police where they could find him. *Gilbert v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 861 (Nov. 17, 2004).

Trial court did not err in denying defendant's motion to suppress certain statements she made during questioning regarding her missing child; although defendant claimed that she had done the best she could to convey to the officer that she was concerned about continuing to talk to him without a lawyer present, when the officer asked defendant whether she was asking for a lawyer, she did not answer that question but continued answering other questions and did not mention a lawyer again during the interview. *Gilbert v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 861 (Nov. 17, 2004).

Where defendant fired four to five shots at the victim from his car, he was properly convicted of first-degree murder; the trial court's error in admitting an interspousal communication from defendant's wife in which defendant said he was going to "kill the other guy" was harmless in light of the overwhelming evidence of defendant's guilt. *Walker v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 471 (June 15, 2005).

In defendant's murder trial, victim's prior statement to police officer, that defendant assaulted her, was admissible under the catch-all exception of Ark. R. Evid. 804(b)(5) with respect to her unavailability and state of mind; as to whether the statement was admissible as a prior bad act, defendant's confession alone overwhelmingly established the elements of murder in the first degree and, thus, any error as to admitting the hearsay statement was harmless. *Wooten v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 812 (Nov. 9, 2005).

Defendant's convictions for first-degree murder, a terroristic act, and possession of firearms by certain persons were proper where the jury believed the witnesses's testimony that defendant fired the only shots and fired toward the group where the victim was standing and toward the nightclub. *Jackson v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 557 (Sept. 29, 2005).

Furtherance or Perpetration of Felony.

Murder committed in the perpetration of or attempt to perpetrate certain felonies, including robbery, was deemed murder in the first degree. *Washington v. State*, 181 Ark. 1011, 28 S.W.2d 1055 (1930) (decision under prior law).

There is no requirement that the underlying felony be a violent one. *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989).

Where an assault was only in the furtherance of a murder, not of some other felony, the defendant would not be guilty of felony-murder even if he were so charged because, for the phrase "in the course of and in furtherance of the felony" to have any meaning, the crime must have an independent objective which the murder facilitates. *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992).

The trial court committed prejudicial error by denying the defendant's motion to dismiss a first-degree felony-murder charge where the proof at trial showed that he assaulted, beat, and kicked the victim in furtherance of the homicide, rather than in furtherance of committing an independent felony. *Craig v. State*, 70 Ark. App. 71, 14 S.W.3d 893 (Apr. 19, 2000).

Indictment or Information.

Indictment held sufficient. *Turnage v. State*, 182 Ark. 74, 30 S.W.2d 865 (1930) (decision under prior law).

Indictment in first degree murder prosecution, charging killing in perpetration of robbery, need not have alleged an intentional and willful killing. *White v. State*, 192 Ark. 1102, 96 S.W.2d 771 (1936) (decision under prior law).

Information charging that murder was committed while attempting to commit robbery and that the crime was premeditated and it was committed with malice aforethought was not inconsistent, premeditation being not an essential element that had to be alleged and proved when the indictment charged that the crime was perpetrated while the accused was attempting robbery. *Noble v. State*, 195 Ark. 453, 112 S.W.2d 631 (1938) (decision under prior law).

Amendment to the information that the offense of murder was committed by defendant while in the attempt to perpetrate the crime of rape was permissible since it

changed neither the nature nor the degree of the crime charged. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958), cert. denied, 359 U.S. 930, 79 S. Ct. 616, 3 L. Ed. 2d 633 (1959) (decision under prior law).

Amended information did not substantially affect the degree of the alleged crime since the original information specifically designated first-degree murder as a capital felony and the amended information charging capital felony murder were virtually identical but for the statutory designation of the offense; the nature of the crime charged was not affected by the amendment. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

One may be charged with conspiracy to commit capital murder and with capital murder also. One could also be charged as an accomplice in the same case. *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

Trial court did not err in refusing to reduce charge to second-degree murder on double jeopardy grounds. *Lamb v. State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988).

Instructions.

Refusal to instruct the jury as to the degree of homicide lower than murder in the first degree held not error. *Alexander v. State*, 103 Ark. 505, 147 S.W. 477 (1912); *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914) (preceding decisions under prior law).

Instruction in prosecution for first degree murder requiring finding that defendant willfully, unlawfully and feloniously and with malice aforethought, and after premeditation and deliberation, or while in the perpetration of or attempt to perpetrate robbery, killed the deceased, was proper though indictment did not allege that the killing was in perpetration of a robbery but alleged the malicious, deliberate and premeditated killing. *House v. State*, 192 Ark. 476, 92 S.W.2d 868 (1936) (decision under prior law).

In a prosecution for murder in the first degree where appellant allegedly poisoned her husband, it was not error for the court to instruct the jury on second degree murder and on this charge appellant was properly convicted. *Smith v. State*, 222 Ark. 650, 262 S.W.2d 272 (1953) (decision under prior law).

Refusal to instruct the jury on lesser

degrees of homicide held error. *Montague v. State*, 240 Ark. 162, 398 S.W.2d 524 (1966); *Bosnick v. State*, 248 Ark. 846, 455 S.W.2d 311 (1970); *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983) (preceding decisions under prior law).

Court did not err in instructing jury on first degree murder where evidence would have supported conviction on that charge. *Ricketts v. State*, 254 Ark. 409, 494 S.W.2d 462 (1973) (decision under prior law).

Where two persons are murdered, there can be no evidence to support an instruction on first degree murder because this section involves the premeditated and deliberate death of one person; accordingly, it was proper for the trial judge in a double murder prosecution to give instructions on capital murder, murder in the second degree and manslaughter, but to refuse to give a requested instruction on murder in the first degree. *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981).

Failure to instruct the jury on the elements of aggravated robbery and robbery in conjunction with its instructions on first-degree murder where the court had already instructed the jury on the elements of those crimes when it gave the charge of capital murder held not error. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

The trial court improperly inserted the words "a felony" in its instructions on first-degree murder instead of inserting the specific underlying felonies of either aggravated robbery or simple robbery. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

Instruction on second-degree murder which provided alternate theories by which the defendant could be convicted held proper. *McLemore v. State*, 274 Ark. 527, 626 S.W.2d 364 (1982).

Defendant held not prejudiced by the trial court's refusal to give his proffered instruction on self-defense. *Johnson v. State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982).

In a prosecution for first degree murder, the trial court did not err in refusing to instruct the jury on the lesser offense of negligent homicide where the trial court did instruct the jury on the lesser offenses of second degree murder and manslaughter. *Sherron v. State*, 285 Ark. 8, 684 S.W.2d 247 (1985).

Where the defense failed to remind the

trial court to give the instruction, and the jury had already heard evidence that the defendant had admitted the killing, the defendant was not prejudiced by the trial court's failure to give a cautionary instruction which would have told the jury that the statement was to be considered only for impeachment purposes and not as substantive evidence of the defendant's guilt. *Futch v. State*, 288 Ark. 323, 705 S.W.2d 11 (1986).

When capital felony murder is charged under subdivision (a)(1) of § 5-10-101, first degree felony murder is "a lesser included offense" because the same evidence used to prove the former of necessity proves the latter; therefore, an instruction on first degree murder is required. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Where the defendant was charged with homicide in the course of a burglary, the failure to instruct on first degree murder was not reversible error because the objection of counsel was that the court should have given the instruction because of evidence, which counsel could not recite, that the defendant entered the victim's residence for a purpose other than to commit a burglary. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

The trial judge did not err in refusing to give the defendant's requested instruction on accident where the defendant's argument that the shooting was accidental was addressed to each charge of first degree murder, second degree murder, and manslaughter, and its appropriately defined mental state, and all requisite mental states were before the jury in proper instructions. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

Where jury convicted defendant on the greater offense of first degree murder even though instructions regarding the lesser included offense of second degree murder had been given any error resulting from the failure to give instructions regarding lesser included offenses of manslaughter and negligent homicide was cured. *Taylor v. State*, 303 Ark. 586, 799 S.W.2d 519 (1990).

In cases where the statutes overlap and both instructions are required, the jury may refuse consideration of both the death penalty and life without parole by returning a guilty verdict as to the charge of murder in the first degree; where the

trial court refused to give instructions on option of first degree murder, it took this option away from the jury and the defendant was prejudiced by the omission of the proper instruction. *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991).

Instruction that jury could find the defendant guilty of first-degree murder if they found he acted with the purpose of causing the death of one of the victims is consistent with the language of this section. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

Court of appeals held that, where a state jury could have convicted petitioner of first-degree murder under former § 5-10-102(a)(3) based on an erroneous jury instruction, trial counsel's failure to object to the instruction was prejudicial and habeas relief was warranted. *Reagan v. Norris*, 365 F.3d 616 (8th Cir. 2004).

Because the jury found defendant guilty of capital murder, it could not consider the charge of murder in the first degree nor its affirmative defense; accordingly, any error the trial court might have committed in instructing the jury on the affirmative defense murder in the first degree was harmless. *Jackson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 557 (Oct. 7, 2004).

Intent.

Substantial evidence existed to convict defendant of attempted first-degree murder where defendant hid under a bed armed with a weapon and, once discovered, emerged from under that bed firing a weapon in the victim's direction; as defendant had communicated his threat to kill the victim and his family to several members of the family, the jury could infer from these circumstances that defendant purposefully intended to engage in conduct that he hoped would result in the victim's death. *Crowder-Jones v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

—In General.

One who commits homicide was not guilty of murder in the first degree unless there existed in his mind, before the act of killing, a specific intent to take the life of the person slain; but it was not necessary that such intent be formed for any partic-

ular length of time before the killing. *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1889) (decision under prior law).

The intent need not be conceived for any particular length of time beforehand. *Rosemond v. State*, 86 Ark. 160, 110 S.W. 229 (1908); *Ferguson v. State*, 92 Ark. 120, 122 S.W. 236 (1909); *Gilchrist v. State*, 100 Ark. 330, 140 S.W. 260 (1911) (preceding decisions under prior law).

Striking one on the head with a bottle could not, as a matter of law, raise a presumption of intent to kill. *Tolliver v. State*, 113 Ark. 142, 167 S.W. 703 (1914) (decision under prior law).

Malice was a necessary element of murder either in the first or second degree. *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939) (decision under prior law).

—Evidence.

Where defendant intended to commit felony, defendant could be found guilty even if he did not intend to kill deceased. *Hankins v. State*, 206 Ark. 881, 178 S.W.2d 56 (1944); *Black v. State*, 215 Ark. 618, 222 S.W.2d 816 (1949), cert. denied, 338 U.S. 956, 70 S. Ct. 490, 94 L. Ed. 590 (1950) (decisions under prior law).

Evidence held sufficient to support a finding of malice. *McClendon v. State*, 197 Ark. 1135, 126 S.W.2d 928 (1939); *Gulley v. State*, 201 Ark. 744, 146 S.W.2d 706 (1941); *Long v. State*, 223 Ark. 387, 266 S.W.2d 66 (1954); *Seward v. State*, 228 Ark. 712, 310 S.W.2d 239 (1958); *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959) (preceding decisions under prior law).

It was not essential to prove any intention to kill, but it sufficed, and a case was made, if the killing occurred in the perpetration of or in the attempt to perpetrate any of the crimes named, although a killing was not intended. *Rayburn v. State*, 200 Ark. 914, 141 S.W.2d 532 (1940) (decision under prior law).

Evidence held sufficient to find a willful killing. *Seward v. State*, 228 Ark. 712, 310 S.W.2d 239 (1958) (decision under prior law).

Where prior intent to kill "someone" was shown, no ill-will need have been shown for deceased, selected at random for wanton execution, as such evidence implied the requisite degree of malice. *Robertson v. State*, 256 Ark. 366, 507 S.W.2d 513 (1974) (decision under prior law).

Premeditation, deliberation, and intent may all be inferred from the circumstances, such as the weapon used, the manner in which it was used, the wounds inflicted, and the conduct of the accused. *Williams v. State*, 289 Ark. 69, 709 S.W.2d 80 (1986); *Thomerson v. Lockhart*, 835 F.2d 1257 (8th Cir. 1987).

Intent to commit murder may, and often must, be inferred from circumstantial evidence. *Parker v. State*, 290 Ark. 158, 717 S.W.2d 800 (1986).

The necessary intent may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Garza v. State*, 293 Ark. 175, 735 S.W.2d 702 (1987); *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991).

The jury could reasonably have inferred the defendant purposely killed his victim based on the type weapon used, the manner of its use, and the location of the wounds. *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991).

It was reasonable to conclude that defendant acted purposefully as an accomplice in causing the death of the victim, where the defendant fired a shotgun at the unarmed victim from an approximate distance of 15 feet and the pathologist who conducted the autopsy testified there was a series of shotgun injuries in the victim's neck and limbs. *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

There was substantial evidence from which jury could have concluded that defendant possessed a purposeful intent to kill. *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991); *Crawford v. State*, 309 Ark. 54, 827 S.W.2d 134 (1992).

Evidence held sufficient to demonstrate that defendant acted with the "purpose of causing the death of another person," under subdivision (a)(2) of this section. *Coleman v. State*, 314 Ark. 143, 860 S.W.2d 747 (1993).

From expert's testimony that the gun used in the shooting was fired at close, or point blank range, the inference could easily be drawn that it was the purpose of the person firing to kill the victim. One is presumed to intend the natural and probable consequences of one's act. *Furr v. State*, 308 Ark. 41, 822 S.W.2d 380 (1992).

Intent is seldom capable of proof by direct evidence. *Akbar v. State*, 315 Ark. 627, 869 S.W.2d 706 (1994).

Psychiatric testimony concerning whether a defendant has the ability to conform his conduct to the requirements of law at the time of the killing as part of an insanity defense may seem in some cases to approximate testimony on whether the defendant had or did not have the required specific intent to commit murder at a precise time; however, a general inability to conform one's conduct to the requirements of the law due to mental defect or illness is the gauge for insanity, and is different from whether the defendant had the specific intent to kill another individual at a particular time. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

Evidence held sufficient to prove defendant acted intentionally. *Williams v. State*, 321 Ark. 635, 906 S.W.2d 677 (1995).

Intent or state of mind, for the purposes of this section, is seldom capable of proof by direct evidence and must usually be inferred from the circumstances surrounding the killing. *Russey v. State*, 322 Ark. 786, 912 S.W.2d 420 (1995).

Where defendant claimed he shot his wife accidentally, detective's testimony concerning domestic violence call some days prior to the shooting was relevant to show lack of mistake or accident on defendant's part; at the very least, detective's testimony showed, by fair inference, that defendant and his loaded shotgun necessitated a call and an investigation by the police. *Russey v. State*, 322 Ark. 786, 912 S.W.2d 420 (1995).

Proof of purpose and lack of justification in violation of subdivision (a)(2) shown where defendant used a handgun to shoot the victim while the victim was pleading for his life and dodging and ducking bullets. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

Evidence was sufficient to establish intent where the defendant repeatedly confessed to shooting the victim, he had previously stated that he would "get" the victim, he obtained .22 shells for his gun, and he shot the victim in the back of his head and back six times. *Copeland v. State*, 343 Ark. 327, 37 S.W.3d 567 (2001).

—Expert Testimony.

Expert testimony on the ability of a defendant to form specific intent to murder is not admissible. *Stewart v. State*, 316 Ark. 153, 870 S.W.2d 752 (1994).

—Motive.

The state is not bound to prove a motive for the killing. *Jones v. State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984); *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

Absence of motive is only a circumstance to be considered with other facts and circumstances in determining guilt or innocence. *Jones v. State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

Where the evidence was substantial that the defendant deliberately and with premeditation killed the victim, the defendant's motive for killing the victim was not something the state had to prove. *Parker v. State*, 290 Ark. 158, 717 S.W.2d 800 (1986); *Ford v. State*, 297 Ark. 77, 759 S.W.2d 556 (1988).

Although the state is not required to prove motive, it may introduce evidence showing all of the circumstances that explain the act, illustrate the accused's state of mind, or show a motive for the crime. *Dixon v. State*, 311 Ark. 613, 846 S.W.2d 170 (1993).

—Premeditation and Deliberation.

While the law presumed that an unlawful killing was malicious, it did not presume it premeditated. *Simpson v. State*, 56 Ark. 8, 19 S.W. 99 (1892) (decision under prior law).

When the intent to kill the person slain was the result of deliberation and premeditation, and reason was not dethroned, it might have been conceived in a moment. *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1889) (decision under prior law).

In the absence of premeditation and deliberation, a killing could not be murder in the first degree. *King v. State*, 68 Ark. 572, 60 S.W. 951 (1901); *Howard v. State*, 82 Ark. 97, 100 S.W. 756 (1907); *Gilchrist v. State*, 100 Ark. 330, 140 S.W. 260 (1911); *King v. State*, 117 Ark. 82, 173 S.W. 852 (1915); *Harris v. State*, 119 Ark. 408, 177 S.W. 1144 (1915); *Stanley v. State*, 183 Ark. 1093, 40 S.W.2d 415 (1931) (preceding decisions under prior law).

Evidence held sufficient to find premeditation and/or deliberation. *King v. State*, 68 Ark. 572, 60 S.W. 951 (1901); *Long v. State*, 223 Ark. 387, 266 S.W.2d 66 (1954); *Seward v. State*, 228 Ark. 712, 310 S.W.2d 239 (1958); *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959) (preceding decisions under prior law); *McLemore v. State*, 274 Ark. 527, 626 S.W.2d 364 (1982); *Long*

v. State, 280 Ark. 327, 657 S.W.2d 551 (1983); *Jones v. State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984); *Thomerson v. Lockhart*, 835 F.2d 1257 (8th Cir. 1987); *Garza v. State*, 293 Ark. 175, 735 S.W.2d 702 (1987); *Williams v. State*, 294 Ark. 345, 742 S.W.2d 932 (1988).

In order to constitute murder in the first degree, there must have been in the mind of the accused a willful, deliberate, and premeditated specific intention to take life. *McClendon v. State*, 197 Ark. 1135, 126 S.W.2d 928 (1939); *Gulley v. State*, 201 Ark. 744, 146 S.W.2d 706 (1941) (preceding decisions under prior law).

Deliberation had to be proven beyond a reasonable doubt. *Simmons v. State*, 227 Ark. 1109, 305 S.W.2d 119 (1957) (decision under prior law).

Deliberation and premeditation could have been inferred from the circumstances of the case. *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959) (decision under prior law); *Garza v. State*, 293 Ark. 175, 735 S.W.2d 702 (1987).

The necessary elements of deliberation and premeditation in the offense of murder in the first degree may be inferred from the factual circumstances as shown by the evidence, where those circumstances clearly warrant the jury in such an inference or conclusion. In this case, the circumstances as reflected by the evidence were inconsistent with any other hypothesis than that of murder in the first degree. *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), reh'g denied, 387 U.S. 926, 87 S. Ct. 2027, 18 L. Ed. 2d 987 (1967) (decision under prior law); *Ford v. State*, 297 Ark. 77, 759 S.W.2d 556 (1988).

The rule that the requisite state of mind of premeditation and deliberation need not exist for any particular length of time is still law. *Fields v. State*, 280 Ark. 153, 655 S.W.2d 419 (1983); *Thomerson v. Lockhart*, 835 F.2d 1257 (8th Cir. 1987).

The jury may infer premeditation and deliberation from the circumstances of the case, such as the character of the weapon used, the manner in which it was used, the nature, extent and location of the wounds inflicted and the like. *Jones v. State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984); *Parker v. State*, 290 Ark. 158, 717 S.W.2d 800 (1986).

The trier of fact must determine beyond a reasonable doubt that the accused premeditated and deliberated the killing in

order to find the accused guilty of first-degree murder. *Thomerson v. Lockhart*, 835 F.2d 1257 (8th Cir. 1987).

Premeditation and deliberation need not be proven by direct evidence. *Thomerson v. Lockhart*, 835 F.2d 1257 (8th Cir. 1987).

Premeditation and deliberation need not exist for any particular length of time and may in fact be formed almost on the spur of the moment. *Harris v. State*, 291 Ark. 504, 726 S.W.2d 267 (1987); *Garza v. State*, 293 Ark. 175, 735 S.W.2d 702 (1987).

Where jury's acquittal of defendant on robbery charge removed the underlying felony from the capital murder charge set forth in the information, which contained no language addressing a question of premeditation and deliberation, the defendant could be convicted of no crime greater than second-degree murder, and conviction for first-degree murder violated defendant's right to due process. *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990).

The mens rea for first degree murder is no longer premeditation and deliberation, therefore, the state is not required to prove that defendant acted with such a mental state. *Smith v. State*, 310 Ark. 247, 837 S.W.2d 279 (1992).

Intoxication.

Testimony by medical doctor about blackout alcoholism in murder trial was simply another means of using voluntary intoxication as a defense and the trial court was correct in its ruling excluding the witness' testimony since voluntary intoxication was no longer a defense to criminal prosecutions. *Spohn v. State*, 310 Ark. 500, 837 S.W.2d 873 (1992).

Voluntary intoxication is not a defense to the charge of murder in the first degree or to the charge of battery in the second degree; voluntary intoxication is not available as a defense for purposes of negating specific intent. *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993).

Lesser Included Offenses.

Where the prosecution of defendant for first-degree murder and aggravated robbery arose from the same incident, his convictions for both aggravated robbery and first-degree murder violated the prohibition against double jeopardy since the aggravated robbery was a lesser included

offense of first-degree murder; therefore, his conviction and sentence for aggravated robbery would be set aside. *Brewer v. State*, 277 Ark. 40, 639 S.W.2d 54 (1982).

Where the defendant was convicted and sentenced for both aggravated robbery and attempt to commit first-degree murder, but the evidence showed that the aggravated robbery was the underlying felony to the charge of attempted murder, the trial court did not have the authority to impose sentences for both offenses; therefore, the conviction and sentence for the less serious offense, the attempted first-degree murder, would be set aside. *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982).

In prosecution for attempted capital felony murder, the jury should have been instructed that attempted murder in the first degree and aggravated assault were lesser included offenses in the charge of criminal attempt to commit capital murder. *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983).

It was permissible for the jury to reject the more serious charge of attempted first degree murder, which would require a finding of a higher degree of culpability than was required of the lesser included offense, and to find defendant guilty of the lesser offense of aggravated assault. *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985).

In a felony murder conviction, the underlying felony is a lesser included offense of the greater offense of felony murder, and the defendant cannot be convicted of, and sentenced for, both offenses. *Wiman v. Lockhart*, 797 F.2d 666 (8th Cir.), cert. denied, 479 U.S. 1021, 107 S. Ct. 678, 93 L. Ed. 2d 728 (1986).

When capital felony murder is charged under § 5-10-101, first-degree murder is a "lesser included offense" because the same evidence used to prove the former of necessity proves the latter. Therefore, an instruction on first-degree murder is required. *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990).

Where the circuit court acquired jurisdiction over a juvenile, criminal defendant, upon the filing of a first degree murder charge, it retained jurisdiction to convict and sentence for the lesser included offense of manslaughter. *Walker v. State*, 309 Ark. 23, 827 S.W.2d 637 (1992).

In a prosecution for first-degree murder for knowingly causing the death of a person aged 14 years or younger, there was no rational basis to justify charging the jury with the lesser offense of second-degree murder because the additional language of knowingly causing the death under circumstances manifesting extreme indifference to human life was not charged in the information and was not required to be proven. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999), overruled in part on other grounds, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

Felony manslaughter is not a lesser included offense of capital felony murder or first-degree felony murder. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Evidence that supports a finding that a defendant has acted knowingly under circumstances manifesting an extreme indifference to the value of human life rather than purposely entitles a defendant to a jury instruction on attempted second-degree murder pursuant to Ark. Code Ann. § 5-10-103(a)(1); that circumstance, attempted second-degree murder is a lesser-included offense of attempted first degree murder as defined by subsection (a)(2). *McCoy v. State*, 74 Ark. App. 414, 49 S.W.3d 154 (2001).

In defendant's first-degree murder case, the court erred by refusing a requested second-degree murder instruction where (1) there was evidence that defendant got into an argument with his wife that escalated into physical violence, (2) when she began hitting him and threatening to kill him, defendant reacted by putting her in a headlock, or possibly choking her, or putting his arms around her neck, and (3) he did not let go until she died; based on the evidence, the jury could have found that defendant assaulted his wife, knowing his conduct was practically certain to cause her death, while being extremely indifferent to the value of human life. *Wyles v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 349 (May 27, 2004).

Where the jury was only given instructions on first and second-degree murder and they convicted defendant of first-degree murder, per the "skip rule", any error in the trial court's failing to give an in-

struction on manslaughter was cure since defendant was convicted of the greater offense. *Wooten v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 812 (Nov. 9, 2005).

Sentence.

Where evidence was insufficient to establish murder in the first degree, but did establish the crime of murder in the second degree, the sentence of murder in the first degree should be set aside and the cause remanded to the circuit court with directions to sentence the prisoner for murder in the second degree. *Simpson v. State*, 56 Ark. 8, 19 S.W. 99 (1892) (decision under prior law).

Where the defendant was convicted of murder in the first degree and error was committed in excluding evidence which might have reduced the punishment to that of murder in the second degree, the Supreme Court could, in its discretion, have remanded the cause with directions to the trial court to sentence the defendant for murder in the second degree. *Vance v. State*, 70 Ark. 272, 68 S.W. 37 (1902) (decision under prior law).

Where, in a murder case, it was shown that the accused and the decedent both used guns but was uncertain which began the shooting, on account of the absence of evidence of deliberation and premeditation, a conviction of murder in the first degree would have been reduced to murder in the second degree. *Phillips v. State*, 190 Ark. 1004, 82 S.W.2d 836 (1935) (decision under prior law).

Sentence properly reduced to range prescribed for second-degree murder. *Wilkins v. State*, 292 Ark. 596, 731 S.W.2d 775 (1987).

Venue.

The trial court did not abuse its discretion in denying a motion for a change of venue in first-degree murder case where the motion came only 2 weeks before trial, after the case had been pending for 9 months, and the affiants could cite little or nothing beyond their own convictions that a fair trial was not possible in the action. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied, 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

View of Crime Scene.

A request to view a place pertinent to a material fact is a matter within the trial

court's discretion, and denial of the request is not a ground for reversal absent an abuse of that discretion. *Williams v. State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

Cited: *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977); *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Davis v. State*, 267 Ark. 507, 592 S.W.2d 118 (1980); *Finnie v. State*, 267 Ark. 638, 593 S.W.2d 32 (1980); *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980); *Ward v. State*, 272 Ark. 99, 612 S.W.2d 118 (1981); *Spillers v. State*, 272 Ark. 212, 613 S.W.2d 387 (1981); *Curry v. State*, 272 Ark. 291, 613 S.W.2d 829 (1981); *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982); *Daniels v. State*, 277 Ark. 23, 638 S.W.2d 676 (1982); *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982); *Branam v. State*, 277 Ark. 204, 640 S.W.2d 445 (1982); *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Maxwell v. State*, 279 Ark. 423, 652 S.W.2d 31 (1983); *Rhodes v. State*, 280 Ark. 156, 655 S.W.2d 421 (1983); *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), petition denied, 282 Ark. 541, 669 S.W.2d 883, cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984); *Johnson v. Lockhart*, 746 F.2d 1367 (8th Cir. 1984); *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186 (1984); *Owens v. State*, 283 Ark. 327, 675 S.W.2d 834 (1984); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Reichert v. State*, 15 Ark. App. 388, 695 S.W.2d 845 (1985); *Madison v. State*, 287 Ark. 179, 697 S.W.2d 106 (1985); *Barnes v. State*, 287 Ark. 297, 698 S.W.2d 504 (1985); *Turner v. State*, 287

Ark. 348, 698 S.W.2d 798 (1985); *Wood v. Lockhart*, 809 F.2d 457 (8th Cir. 1987); *Simmons v. Lockhart*, 814 F.2d 504 (8th Cir. 1987); *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987); *Muck v. State*, 292 Ark. 310, 730 S.W.2d 214 (1987); *Hedrick v. State*, 292 Ark. 411, 730 S.W.2d 488 (1987); *Shipley v. State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Findley v. State*, 300 Ark. 265, 778 S.W.2d 624 (1989); *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990); *Ritchie v. State*, 31 Ark. App. 177, 790 S.W.2d 919 (1990); *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991); *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994); *Sutton v. State*, 317 Ark. 447, 878 S.W.2d 748 (1994); *Reagan v. State*, 318 Ark. 380, 885 S.W.2d 849 (1994); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *O'Neal v. State*, 321 Ark. 626, 907 S.W.2d 116 (1995), (decision under prior law); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *Smith v. State*, 324 Ark. 74, 918 S.W.2d 714 (1996); *Webb v. State*, 328 Ark. 12, 941 S.W.2d 417 (1997); *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Cates v. State*, 329 Ark. 585, 952 S.W.2d 135 (1997); *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119 S. Ct. 89, 142 L. Ed. 2d 70 (1998); *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998); *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002), aff'd, 322 F.3d 500 (8th Cir. 2003); *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003); *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

5-10-103. Murder in the second degree.

(a) A person commits murder in the second degree if:

(1) The person knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the purpose of causing serious physical injury to another person, the person causes the death of any person.

(b) Murder in the second degree is a Class A felony.

History. Acts 1975, No. 280, § 1503; A.S.A. 1947, § 41-1503; Acts 1989, No. 856, § 3; 2005, No. 1532, § 1.

Amendments. The 2005 amendment inserted "or she" in (a)(1) and (2); and substituted "Class A" for "Class B" in (b).

RESEARCH REFERENCES

ALR. Propriety of lesser included offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases. 3 A.L.R.6th 543.

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Notes, Criminal Law — Child Abuse Resulting in Death — Arkansas Amends its First Degree Murder Statute, 10 UALR L.J. 785.

CASE NOTES

ANALYSIS

Defenses and justification.

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Defenses and Justification.

It was proper to refuse to instruct that, although the defendant provoked a fight with the deceased, if deceased defended himself with a potentially deadly weapon, the defendant should have been acquitted of murder in the second degree. *Blair v. State*, 69 Ark. 558, 64 S.W. 948 (1901) (decision under prior law).

Where one too drunk to know what he was about assaulted another without provocation and beat him to death, he was guilty of murder in the second degree. *Byrd v. State*, 76 Ark. 286, 88 S.W. 974 (1905) (decision under prior law).

If a person killed in self-defense or defense of his house, where there were no reasonable grounds of danger, it was manslaughter, but where the deceased was unlawfully attempting to enter the defendant's dwelling house and the killing was with malice and not for protection, it was murder. *Hall v. State*, 113 Ark. 454, 168 S.W. 1122 (1914) (decision under prior law).

If one voluntarily became too drunk to know what he was about and then without provocation assaulted and beat another to death, he committed murder as if he were sober. *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939) (decision under prior law).

In murder prosecution of defendant who, while intoxicated, beat victim to death, evidence being sufficient to sustain

verdict and judgment for murder in first degree, submitting instruction on murder in second degree was not error. *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939) (decision under prior law).

Conviction of defendant for second degree murder was justified even though defendant was drunk at the time of the shooting, as voluntary intoxication was no defense to a charge of murder, for the drinking supplied the malice. *Newsome v. State*, 214 Ark. 48, 214 S.W.2d 778 (1948) (decision under prior law).

Even if the jury believed that the victim was the original aggressor, it was not established, as a matter of law, that the use of deadly physical force by the defendant was justified. *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

Refusal to give instruction on a person's right to use reasonable force to protect himself and on a person's right to not retreat when in his own home where testimony indicated that the victim was in defendant's home, that the victim threatened to kill defendant, that defendant was scared of the victim and that defendant repeatedly asked the victim to leave him alone but that the victim refused to do so held error. *Doles v. State*, 275 Ark. 448, 631 S.W.2d 281 (1982).

Refusal to give his proffered instruction on self-defense was not prejudicial to defendant. *Johnson v. State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982).

Accident was an instruction often given by trial courts in the past, but it is neither a defense nor an affirmative defense under the criminal code, rather, it is a position which a defendant may assert to create a reasonable doubt of guilt; accordingly, court in second-degree murder prosecution properly refused to give proposed instruction on accident. *Blaney v. State*, 280 Ark. 253, 657 S.W.2d 531 (1983).

Defendant held not entitled to instruction on justification for use of physical force. *Blaney v. State*, 280 Ark. 253, 657 S.W.2d 531 (1983).

Evidence.

Evidence held insufficient to support a conviction. *Tanks v. State*, 71 Ark. 459, 75 S.W. 851 (1903) (decision under prior law); *Graham v. State*, 6 Ark. App. 376, 642 S.W.2d 342 (1982).

Evidence held sufficient to sustain conviction. *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939); *Bowman v. State*, 213 Ark. 407, 210 S.W.2d 798 (1948); *Powell v. State*, 213 Ark. 442, 210 S.W.2d 909 (1948); *Everett v. State*, 213 Ark. 470, 210 S.W.2d 918 (1948); *Higdon v. State*, 213 Ark. 881, 213 S.W.2d 621 (1948); *Stovall v. State*, 233 Ark. 597, 346 S.W.2d 212 (1961); *Decker v. State*, 234 Ark. 518, 353 S.W.2d 168 (1962); *Lillard v. State*, 236 Ark. 74, 365 S.W.2d 144 (1963); *Erby v. State*, 253 Ark. 603, 487 S.W.2d 266 (1972); *Ricketts v. State*, 254 Ark. 409, 494 S.W.2d 462 (1973) (preceding decisions under prior law); *Spillers v. State*, 272 Ark. 212, 613 S.W.2d 387 (1981); *Blaney v. State*, 280 Ark. 253, 657 S.W.2d 531 (1983); *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983); *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Heard v. State*, 284 Ark. 457, 683 S.W.2d 232 (1985); *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987); *Shipley v. State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988); *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990); *Flowers v. State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990); *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994); *Paige v. State*, 45 Ark. App. 13, 870 S.W.2d 771 (1994).

Circumstantial evidence held sufficient to sustain verdict of murder in the second degree. *Thomas v. State*, 250 Ark. 504, 465 S.W.2d 704 (1971) (decision under prior law); *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *Tucker v. State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981); *Ward v. State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982).

Evidence held sufficient to support a finding that there was extreme indifference to the value of human life. *Harris v. State*, 262 Ark. 680, 561 S.W.2d 69 (1978), *aff'd*, 265 Ark. 517, 580 S.W.2d 453 (1979);

Spillers v. State, 272 Ark. 212, 613 S.W.2d 387 (1981).

Evidence which tended to prove that defendant acted knowingly rather than accidentally was held to be relevant, and was not rendered inadmissible because it could also be taken to imply that defendant intended to kill his wife. *Harris v. State*, 265 Ark. 517, 580 S.W.2d 453 (1979).

Admission of photographic evidence held proper. *Spillers v. State*, 272 Ark. 212, 613 S.W.2d 387 (1981); *Hallman v. State*, 288 Ark. 448, 706 S.W.2d 381 (1986).

For circumstantial evidence to be sufficient to support a murder conviction, it must exclude every other reasonable hypothesis consistent with innocence, and the question of whether it does exclude every other reasonable hypothesis is usually for the fact finder to determine. *Ward v. State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982).

Evidence is substantial if the jury could have reached its conclusion without having to resort to speculation or conjecture. *Heard v. State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

Trial court's determination that defendant's incriminating statements were voluntarily made held not clearly erroneous. *Hallman v. State*, 288 Ark. 448, 706 S.W.2d 381 (1986).

Testimony of accomplice held sufficiently corroborated to sustain defendant's murder conviction. *Hallman v. State*, 288 Ark. 448, 706 S.W.2d 381 (1986).

Where, in prosecution of a homicide, the defendant did not know at the time of the shooting of the victim that a police officer had discovered a gun in the victim's car two years earlier, the trial court acted properly in refusing to admit the officer's testimony. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

Summarization of defendant's confession held harmless. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

In prosecution for murder, the presence of blood on clothing and bed linens was relevant and admissible even though the blood could not be typed, because it corroborated the medical examiner's report of the victim's injuries and the defendant's confession. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

There was substantial evidence to support a conviction for second-degree murder under this section where the defendant stated that the gun fired because it had a hair trigger, but a firearms examiner testified that the gun did not have a hair trigger, and testimony adduced at trial indicated that the defendant had tried to run over the victim with a truck before and that he had threatened to hit her in the head with a bottle. *Bovee v. State*, 19 Ark. App. 268, 720 S.W.2d 322 (1986).

Inflammatory photographs are admissible if they tend to shed light on an issue, enable a witness to better describe the objects portrayed, or enable the jury to better understand the testimony. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Where the trial court considered the questioned photographs, each individually, on two separate occasions at a pre-trial conference and again at trial, it did not admit the photographs with "carte blanche" approval or with a manifest abuse of its discretion. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Where the trial court twice considered the admissibility of a videotape of the crime scene showing the house and the body, and placed limitations on the portions that could be published to the jury, it did not abuse its discretion in admitting the tape into evidence. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

The act of pointing a loaded weapon at another person is sufficient to constitute the requisite manifestation of extreme indifference to the value of human life, necessary for a second degree murder conviction under subdivision (a)(1) of this section, regardless of whether there was an actual intent to shoot. *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002).

Trial court erred in refusing to admit the opinion testimony of an eyewitness that a shooting had been accidental, because the testimony would have been helpful to the determination of a fact in issue, namely, whether defendant had committed first-degree murder or a lesser-included offense. *Simpson v. State*, 82 Ark. App. 76, 110 S.W.3d 286 (2003).

Defendant's accomplice's testimony was corroborated and admissible, as other evidence independently established the accomplice's description of the double mur-

der; the medical examiner's testimony, an officer's testimony, and testimony that defendant's van contained substantial blood from the victims, all were in accordance with the accomplice's testimony of the homicide. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

In defendant's murder trial, the key witness who was at the scene of the shooting allegedly battered a woman in retaliation against the her for not relaying the information the key witness wanted the woman to impart to the police, but that key witness was not charged with any offense; those matters were relevant, reflecting upon the key witness's interest, motives in testifying, and bias, and the trial court committed reversible error in restricting cross-examination on the subject. *Ghoston v. State*, 84 Ark. App. 387, 141 S.W.3d 907 (2004).

In a "knock and talk" procedure whereby police officers went to defendants' residence without sufficient probable cause to obtain a search warrant and ask the first defendant to allow them entry and, after gaining entry, informed the her that they were investigating potential criminal activity and requested permission to search, none of the officers informed the second defendant that he had the right to refuse consent to the entry and subsequent search of his home; thus, the trial court should have granted the second defendant's motion to suppress all of the evidence that flowed from that unconstitutional search. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004).

Trial court committed reversible error by admitting co-defendant's statement; it was a violation of defendant's Sixth Amendment right to confront witnesses where, even changing defendant's name to a pronoun, it was obvious that the references were indirect or veiled references to him and substantiated his existence and identity relative to the crime. *Jefferson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 416 (June 2, 2004).

Indictment or Information.

Indictment or information held sufficient. *Beard v. State*, 269 Ark. 16, 598 S.W.2d 72 (1980).

Instructions.

Refusal to instruct the jury on lesser degree of homicide held proper. *Gilchrist*

v. State, 241 Ark. 561, 409 S.W.2d 329 (1967) (decision under prior law).

Instruction on second-degree murder which provided alternate theories by which the defendant could be convicted held to be proper. *McLemore v. State*, 274 Ark. 527, 626 S.W.2d 364 (1982).

In a capital felony murder instruction on the lesser included offense of second-degree murder held not to have prejudiced the defendant. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

Failure to give proffered instruction on manslaughter where there was evidence presented on which the jury might have found that defendant recklessly caused the death of his brother was prejudicial error. *Williams v. State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986).

The trial judge did not err in refusing to give the defendant's requested instruction on accident where the defendant's argument that the shooting was accidental could have been, and was, addressed to each charge of first degree murder, second degree murder, and manslaughter, and its appropriately defined mental state, and all requisite mental states were before the jury in proper instructions. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

Where the defendant was found guilty of second degree murder, the trial court did not err in refusing to give an instruction on negligent homicide; it is not error to refuse to give an instruction on one lesser included offense if other lesser offenses were covered by the instructions given and the jury returned a verdict for the greater offense. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

In a prosecution for second degree murder, the trial court committed reversible error when it refused to give a proffered manslaughter instruction where (1) the defendant intervened in an argument between the victim and the mother of his child, (2) during the ensuing conversation, the victim stated, "If I got a problem, I just boom-boom-boom, like that," and all of the witnesses who were present took the victim's remarks to mean that he would shoot a gun to end any problem, (3) the defendant and the victim thereafter walked to their respective cars, (4) the defendant retrieved a shotgun from the trunk of his car, and the victim stood by

the driver's side door of his car and reached down into the car through the open window, (5) as the victim came back up from reaching into the car, the defendant shot him in the chest, and (6) the defendant testified that he was afraid of the victim because he was acting and talking crazy and that he thought the victim was about to shoot him. *Harshaw v. State*, 71 Ark. App. 42, 25 S.W.3d 440 (2000).

The defendant in a prosecution for second degree murder was entitled to have the jury instructed with regard to the lesser included offense of manslaughter, since there was some evidence suggesting that the victim posed a real or deadly threat to the defendant, where witnesses testified that the victim made threatening remarks and reached for something in his car immediately prior to the homicide. *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001).

Intent.

Actual intent to take life was not a necessary element in the crime of murder in the second degree. *Brassfield v. State*, 55 Ark. 556, 18 S.W. 1040 (1892); *Byrd v. State*, 76 Ark. 286, 88 S.W. 974 (1905); *Petty v. State*, 76 Ark. 515, 89 S.W. 465 (1905); *Tolliver v. State*, 113 Ark. 142, 167 S.W. 703 (1914); *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914); *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939); *McGaha v. State*, 216 Ark. 165, 224 S.W.2d 534 (1949); *Rand v. State*, 232 Ark. 909, 341 S.W.2d 9 (1960); *Seabourn v. State*, 236 Ark. 175, 365 S.W.2d 133 (1963) (preceding decisions under prior law).

Malice was a necessary element of murder. *Ballentine v. State*, 198 Ark. 1037, 132 S.W.2d 384 (1939) (decision under prior law).

It was a question for the jury to decide in a case charging defendant with murder, whether repeated violent attacks by defendant on a much older man culminating in death amounted to malice on the part of the defendant. *McGaha v. State*, 216 Ark. 165, 224 S.W.2d 534 (1949) (decision under prior law).

The presence or absence of malice distinguished between murder in the second degree and manslaughter, and malice was implied whenever there was a killing with a deadly weapon and no circumstances of mitigation, justification or excuse ap-

peared at the time of the killing. *Erby v. State*, 253 Ark. 603, 487 S.W.2d 266 (1972) (decision under prior law).

Evidence held sufficient to show sufficient malice to support conviction. *Ricketts v. State*, 254 Ark. 409, 494 S.W.2d 462 (1973) (decision under prior law).

State must show that the defendant acted with an awareness of his conduct and the relevant attendant circumstances and that his conduct was practically certain to cause the death of the victim. *Harris v. State*, 262 Ark. 680, 561 S.W.2d 69 (1978); *Heard v. State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

Evidence held sufficient to support a verdict that defendant "knowingly" caused another's death. *Harris v. State*, 262 Ark. 680, 561 S.W.2d 69 (1978), *aff'd*, 265 Ark. 517, 580 S.W.2d 453 (1979).

Failure of proof of premeditation and deliberation may still result in a conviction of second-degree murder which only requires a purposeful homicide or a homicide which was knowingly caused under circumstances manifesting extreme indifference to the value of human life. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

A person acts "knowingly" when he is aware of the nature of his conduct, the attendant circumstances and that his conduct is practically certain to cause the result. *Johnson v. State*, 270 Ark. 992, 606 S.W.2d 752 (1980).

Evidence held insufficient to justify conclusion that defendant was aware that his conduct was practically certain to cause the death of another person. *Johnson v. State*, 270 Ark. 992, 606 S.W.2d 752 (1980).

Where information contained no language addressing a question of premeditation and deliberation, the defendant could be convicted of no crime greater than second-degree murder. *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990).

Repeated blows to the head by kicking or "stomping" when the victim was down exhibited purposeful action to inflict serious physical injury, whether it be risk of death or protracted disfigurement or impairment. *Anderson v. State*, 312 Ark. 606, 852 S.W.2d 309 (1993).

Where defendant shot the victim at point-blank range with a shotgun, there was sufficient evidence for the jury to conclude that he "knowingly" caused

death under circumstances manifesting extreme indifference to the value of human life as required for a conviction for second-degree murder under subdivision (a)(1) of this section. *Harshaw v. State*, 348 Ark. 62, 71 S.W.3d 548 (2002).

Judicial Review.

On appeal the evidence will be viewed in the light most favorable to the defendant, and the verdict will be affirmed if there is substantial evidence to support it. *Heard v. State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

Lesser Included Offenses.

Second-degree murder is not a lesser-included offense of capital felony murder. *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Second-degree murder is a lesser-included offense of capital murder only if the accused's mental state is an element of the offense. *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Evidence that supports a finding that a defendant has acted knowingly under circumstances manifesting an extreme indifference to the value of human life rather than purposely entitles a defendant to a jury instruction on attempted second-degree murder pursuant to subsection (a)(1); under that circumstance attempted second-degree murder is a lesser-included offense of attempted first degree murder as defined by § 5-10-102(a)(2). *McCoy v. State*, 74 Ark. App. 414, 49 S.W.3d 154 (2001).

In defendant's first-degree murder case, the court erred by refusing a requested second-degree murder instruction where (1) there was evidence that defendant got into an argument with his wife that escalated into physical violence, (2) when she began hitting him and threatening to kill him, defendant reacted by putting her in a headlock, or possibly choking her, or putting his arms around her neck, and (3) he did not let go until she died; based on the evidence, the jury could have found that defendant assaulted his wife, knowing his conduct was practically certain to cause

her death, while being extremely indifferent to the value of human life. *Wyles v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 349 (May 27, 2004).

Cited: *Bevills v. State*, 264 Ark. 846, 575 S.W.2d 443 (1979); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980); *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3 (1982); *Montgomery v. State*, 277 Ark. 95, 640 S.W.2d 108 (1982); *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599 (1982); *Washington v.*

State, 6 Ark. App. 85, 638 S.W.2d 690 (1982); *Deviney v. State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985); *Spillers v. Lockhart*, 802 F.2d 1007 (8th Cir. 1986); *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989); *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989); *Edwards v. State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992); *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

5-10-104. Manslaughter.

(a) A person commits manslaughter if:

(1)(A) The person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse.

(B) The reasonableness of the excuse is determined from the viewpoint of a person in the defendant's situation under the circumstances as he or she believes them to be;

(2) The person purposely causes or aids another person to commit suicide;

(3) The person recklessly causes the death of another person; or

(4) Acting alone or with one (1) or more persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice negligently causes the death of any person; or

(ii) Another person who is resisting the felony or flight causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(4) of this section for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the homicidal act's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(c) Manslaughter is a Class C felony.

History. Acts 1975, No. 280, § 1504; A.S.A. 1947, § 41-1504.

RESEARCH REFERENCES

ALR. Propriety of lesser included offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases. 3 A.L.R.6th 543.

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CASE NOTES

ANALYSIS

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Construction.

An unborn viable fetus is not a "person" as that term is used in subdivision (a)(3) of this section. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Accomplices.

No accomplice criminal responsibility results from supplying an intoxicant to one allegedly responsible as a principal for violations of subdivision (a)(1) of this section, § 5-13-204(a), or § 27-53-101(a)(1). *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

Employer held civilly liable where an employee killed his employer's neighbor when the neighbor pointed a gun at the employer; the employee was liable for manslaughter and his employer was an accomplice to that manslaughter. *Costner v. Adams*, 82 Ark. App. 148, 121 S.W.3d 164 (2003).

Course of Conduct.

Conduct upon which the state based

charges of manslaughter and second degree battery, a car wreck, was not a single, continuous and uninterrupted act out of which the defendant could only be prosecuted for one offense; neither manslaughter nor second degree battery is specifically defined as a continuing course of conduct. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

Double Jeopardy.

Where one victim was not dead at the time of manslaughter conviction based on death of another victim of the same incident, subsequent prosecution for manslaughter of second victim was not barred. This "not yet consummated" exception to a defendant's right not to be tried twice for the same offense does not violate the principle of former jeopardy. *Tackett v. State*, 294 Ark. 609, 745 S.W.2d 625 (1988).

Evidence.

Evidence held sufficient to sustain conviction. *Pixley v. State*, 203 Ark. 42, 155 S.W.2d 710 (1941); *Ramick v. State*, 212 Ark. 700, 208 S.W.2d 3 (1948); *Cooley v. State*, 213 Ark. 503, 211 S.W.2d 114 (1948); *Connolly v. State*, 233 Ark. 826, 350 S.W.2d 298 (1961); *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965); *Cook v. State*, 248 Ark. 332, 451 S.W.2d 473 (1970); *Hathcock v. State*, 256 Ark. 707, 510 S.W.2d 276 (1974) (preceding decisions under prior law); *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *Bevills v. State*, 264 Ark. 846, 575 S.W.2d 443 (1979); *Kirkendall v. State*, 265 Ark. 853, 581 S.W.2d 341 (1979); *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980); *Darville v. State*, 271 Ark. 580, 609 S.W.2d

50 (1980); *Smith v. State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981); *Worring v. State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981), *aff'd*, 6 Ark. App. 64, 638 S.W.2d 678 (1982); *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987); *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1988), *cert. denied*, 490 U.S. 1047, 109 S. Ct. 1956, 104 L. Ed. 2d 425 (1989); *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

In a trial for murder, it was not error for the court to have submitted the issue of manslaughter to the jury if the proof would have supported a finding that defendant was guilty of a higher degree of homicide than that for which he was convicted. *Patrick v. State*, 245 Ark. 923, 436 S.W.2d 275 (1969) (decision under prior law).

In a murder prosecution where defendant attempted to show that he should only be convicted of manslaughter because he caused a death under circumstances that would have been murder but for the influence of extreme emotional disturbance for which there is a reasonable excuse, the trial court did not abuse its discretion in refusing to allow a counselor, who was concededly an expert in the field of social work, to give an opinion as to the defendant's mental condition. *Wilburn v. State*, 289 Ark. 224, 711 S.W.2d 760 (1986).

The defendant was properly convicted of first degree murder, rather than manslaughter, notwithstanding his contention that he shot the victim under the influence of extreme emotional disturbance for which there was reasonable excuse, where (1) after having sex with the victim in his car and leaving the area, the defendant discovered that his wallet was missing, (2) the defendant went back to the area and found his wallet on the ground, with cash missing, (3) the defendant went home, got his gun and then found the victim and accused her of taking his money, (4) she stated that she did not have his money and taunted him, saying that she did not believe he would shoot her, and (5) the defendant then shot her three times. *Franks v. State*, 342 Ark. 167, 27 S.W.3d 377 (2000).

Extreme Emotional Disturbance.

Instruction on manslaughter properly refused where there was proof of intense anger on the part of defendant, but there

was no proof of provocation in the form of physical fighting, a threat, or a brandished weapon, as anger alone does not constitute extreme emotional disturbance. *Spann v. State*, 328 Ark. 509, 944 S.W.2d 537 (1997).

Elements of emotional disturbance include external events, but not mental diseases or defects; therefore, expert testimony was not admissible in a murder trial to show that defendant was mildly mentally retarded and had a schizo-affective disorder in order to support a voluntary manslaughter instruction. *Bankston v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 161 (Mar. 10, 2005).

In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as physical fighting, a threat, or a brandished weapon; passion alone will not reduce a homicide from murder to manslaughter. *Boyle v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 561 (Sept. 29, 2005).

First-Degree Battery.

The mere fact that the jury convicted the defendant of manslaughter, which required proof of reckless conduct, did not require a conclusion that the jury could not also have found him guilty of first-degree battery, an offense that requires a more culpable mental state, with respect to the survivor of the automobile accident that the defendant caused. *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982).

Indictment or Information.

Indictment held to sufficiently charge the defendant knew that the poison which he procured and delivered to the deceased was to be used by her for the purpose of suicide and it was given to her for that purpose. *Farrell v. State*, 111 Ark. 180, 163 S.W. 768 (1914) (decision under prior law).

A prosecution for manslaughter on an information did not violate the state or federal constitutions. *Washington v. State*, 213 Ark. 218, 210 S.W.2d 307, *cert. denied*, 335 U.S. 884, 69 S. Ct. 232, 93 L. Ed. 423 (1948) (decision under prior law).

Information held to adequately state the crime with which the defendant was charged. *Smith v. State*, 231 Ark. 235, 330 S.W.2d 58 (1960) (decision under prior law).

Section 20-17-101, defining when one is legally dead and requiring that a determination of death shall be made in accordance with accepted medical standard, does not require that proof of death for the purposes of criminal prosecution be made only by autopsy evidence or by specific medical opinion. *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987).

Instructions.

Instruction on requisite state of mind — held to constitute a correct statement of the law. *Nagel v. State*, 179 Ark. 625, 17 S.W.2d 317 (1929) (decision under prior law).

Where evidence was such that it would have supported a conviction of a more severe degree of homicide, defendant was not entitled to reversal because court instructed on first degree murder and refused to instruct on manslaughter. *Bingley v. State*, 235 Ark. 982, 363 S.W.2d 530, cert. denied, 375 U.S. 909, 84 S. Ct. 202, 11 L. Ed. 2d 148 (1963) (decision under prior law).

Instruction defining murder in the second degree held proper, as it was necessary that murder be defined in order that the jury could determine whether defendant was guilty of manslaughter. *Tiner v. State*, 239 Ark. 819, 394 S.W.2d 608 (1965) (decision under prior law).

Refusal or failure to instruct on manslaughter held proper. *Freeman v. State*, 240 Ark. 915, 403 S.W.2d 61 (1966); *Williams v. State*, 250 Ark. 859, 467 S.W.2d 740 (1971) (preceding decisions under prior law); *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981).

The trial court did not err in refusing to instruct the jury upon § 5-2-620, where the jury was instructed pursuant to AMCI 4105, which required the State to overcome defendant's reliance on self-defense of his person by a standard of beyond a reasonable doubt. *Clark v. State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985).

Failure to give proffered instruction on manslaughter held error. *Williams v. State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986).

The trial judge did not err in refusing to give the defendant's requested instruction on accident where the defendant's argument that the shooting was accidental could have been, and was, addressed to each charge of first degree murder, second

degree murder, and manslaughter, and its appropriately defined mental state, and all requisite mental states were before the jury in proper instruction. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

Where evidence was sufficient that the jury could find an extreme emotional disturbance for which there was a reasonable excuse, and thus it could have found defendant guilty of manslaughter rather than murder in the first degree, a manslaughter instruction was warranted and failure to give the manslaughter instruction was prejudicial. *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992).

Where defendant admitted to shooting the unarmed victim once in the back causing paralysis and shooting the victim a second time while he was incapable of moving or causing harm to defendant, it is clear that a justification defense is inconsistent with the "recklessly causing" element found in the offense of manslaughter, and there was no rational basis for giving the manslaughter instruction. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000).

Defendant's conviction for first-degree murder was improper where the evidence warranted a manslaughter instruction that should have been presented to the jury; defendant requested the manslaughter instruction based upon the premise that he caused the victim's death under the influence of extreme emotional disturbance for which there was a reasonable excuse, and the evidence entitled defendant to the manslaughter instruction. *Whittier v. State*, 84 Ark. App. 362, 141 S.W.3d 924 (2004).

In defendant's first-degree murder case, the court erred by refusing a requested manslaughter instruction under subdivision (a)(1) where (1) there was evidence that defendant got into an argument with his wife that escalated into physical violence, (2) when she began hitting him and threatening to kill him, defendant reacted by putting her in a headlock, or possibly choking her, or putting his arms around her neck, and (3) he did not let go until she died; based on the evidence, the jury could have found that defendant assaulted his wife under the influence of extreme emotional disturbance for which there was a reasonable excuse. *Wyles v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 349 (May 27, 2004).

Intent.

Where one struck another with intent merely to inflict chastisement and death resulted from some peculiarity in the deceased's constitution or other unexpected incident, the result was manslaughter merely; but where death naturally ensued from the force or manner of instrumentality of the chastisement and the chastisement was made regardless of its probable result in death, the jury was authorized to find deliberation and specific intent to take life and consequently to convict of murder in the first degree. *Rosemond v. State*, 86 Ark. 160, 110 S.W. 229 (1908) (decision under prior law).

A homicide could be reduced from murder to manslaughter unless the assault was made with an intent to kill. *Young v. State*, 99 Ark. 407, 138 S.W. 475 (1911) (decision under prior law).

The intent to kill was unnecessary to constitute manslaughter. *Seabourn v. State*, 236 Ark. 175, 365 S.W.2d 133 (1963) (decision under prior law).

Lesser Included Offenses.

Negligent homicide, which requires a lesser culpable mental state than manslaughter, is a lesser included offense of manslaughter. *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

Battery in the second degree and battery in the third degree require proof that a deadly weapon was used; in contrast, use of a deadly weapon is not necessary for the commission of manslaughter. Since battery in the second degree and third degree require proof of an element not an element of proof of manslaughter, they are not lesser included offenses of manslaughter. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Where the circuit court acquired jurisdiction over a juvenile, criminal defendant, upon the filing of a first degree murder charge, it retained jurisdiction to convict and sentence for the lesser included offense of manslaughter. *Walker v. State*, 309 Ark. 23, 827 S.W.2d 637 (1992).

Felony manslaughter added an additional element to felony murder relating to the perpetration of the murder itself and, therefore, was not a lesser-included offense of capital murder or first-degree murder. *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002).

For defendant to be entitled to an in-

struction on manslaughter under subdivision (a)(1) of this section, the evidence had to reveal that the murder was the result of a provocation leading to an extreme emotional disturbance; the instruction was not appropriate in the absence of any proof of provocation from the victim herself. *MacKool v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 498 (Sept. 22, 2005).

Provocation, Justification, Etc.

Homicide committed in a sudden heat of passion could constitute manslaughter. *Perrymore v. State*, 73 Ark. 278, 83 S.W. 909 (1904); *Allison v. State*, 74 Ark. 444, 86 S.W. 409 (1904) (preceding decisions under prior law).

Invited provocation would not reduce the crime to manslaughter, when defendant has not attempted to retire from the encounter, although it was otherwise where the assault was returned by violence beyond what was proportionate to the aggression. *Noble v. State*, 75 Ark. 246, 87 S.W. 120 (1905) (decision under prior law).

Provocation on the part of one person does not justify his killing another. *Dow v. State*, 77 Ark. 464, 92 S.W. 28 (1906) (decision under prior law).

Mere words, however abusive, would not reduce the degree of homicide to manslaughter. *Dow v. State*, 77 Ark. 464, 92 S.W. 28 (1906); *Wheatley v. State*, 93 Ark. 409, 125 S.W. 414 (1910) (preceding decisions under prior law).

Threats or menaces would not reduce a homicide to manslaughter, where the person killed was unarmed and not attempting to commit violence. *Clardy v. State*, 96 Ark. 52, 131 S.W. 46 (1910) (decision under prior law).

The passion must have been caused by provocation apparently sufficient to cause such passion, in order to have reduced the homicide to manslaughter. *Clardy v. State*, 96 Ark. 52, 131 S.W. 46 (1910); *Downey v. Duff*, 106 Ark. 4, 152 S.W. 1010 (1912) (preceding decisions under prior law).

Killing in heat of passion could reduce homicide from murder to manslaughter; and defendant was entitled to show the existence of passion, fear or terror. *Collins v. State*, 102 Ark. 180, 143 S.W. 1075 (1912) (decision under prior law).

Where defendant shot and killed under

the belief that he was about to be assaulted, but acted too hastily and without due care, he was guilty of manslaughter. *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913) (decision under prior law).

A defendant could show the existence of passion unless he sought the difficulty with malice toward deceased. *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914) (decision under prior law).

Where one friend teases another, there is no reasonable excuse for a state of emotional disturbance so great as to excuse killing. Testimony that defendant became irritated or annoyed because the victim teased him did not constitute evidence of extreme emotional disturbance, and, even if defendant's irritation from being teased could somehow constitute extreme emotional disturbance, there was no proof that it was reasonable. *Frazier v. State*, 309 Ark. 228, 828 S.W.2d 838 (1992).

The defense of justification is conditioned on a reasonable belief on the part of the actor that unlawful physical force is about to be inflicted on him. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

Reckless Conduct.

Evidence held sufficient that the defendant's conduct was reckless. *Smith v. State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981).

Where defendant's conduct evidenced an overall state of mind which far exceeded "gross deviation from the standard of care," there was no rational basis for a manslaughter instruction on the chance that the jury might consider his conduct reckless as opposed to purposeful or knowing. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

Defendant recklessly caused the death of her baby by consciously disregarding a substantial and unjustifiable risk that death might occur if she did not feed the baby more often. *Miles v. State*, 59 Ark. App. 97, 954 S.W.2d 286 (1997).

Second-degree murder conviction was affirmed because defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter; defendant's act of shooting into an ex-spouse's occupied vehicle did not con-

stitute recklessness. *Bankston v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 161 (Mar. 10, 2005).

Sentence.

Where the defendant was jointly tried for the death of an adult and a viable fetus, and the state erroneously introduced evidence concerning the viability of the fetus at various stages of gestation, and then presented detailed evidence about the death of the fetus as a result of "slow asphyxiation" caused by a "shearing" of the umbilical cord, the erroneous evidence would not have influenced the jury on the question of guilt or innocence, but could have improperly influenced the jury in fixing the sentence; therefore, the sentence was reduced to the minimum the jury could have set for the offense of which the defendant was convicted. *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

Speedy Trial.

The crime of manslaughter is not consummated until the death of the victim, and so defendant was not denied his right to a speedy trial on manslaughter charges where charges were brought within 2 months of victim's death, which occurred more than 4 years after the incident which caused her to go into a vegetative coma. *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614 (1988).

Cited: *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977); *West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981); *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982); *Knappenberger v. State*, 278 Ark. 382, 647 S.W.2d 417 (1983); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Biniore v. State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985); *Rode v. Lockhart*, 675 F. Supp. 491 (E.D. Ark. 1987); *Sparks v. State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988); *Starling v. State*, 301 Ark. 603, 786 S.W.2d 114 (1990); *Smith v. State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990); *McDonald v. State*, 42 Ark. App. 37, 852 S.W.2d 833 (1993); *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994); *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995); *Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996); *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996).

5-10-105. Negligent homicide.

(a)(1) A person commits negligent homicide if he or she negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:

(A) While intoxicated;

(B)(i) If at that time there is an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood based upon the definition of breath, blood, and urine concentration in § 5-65-204, as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

(ii) The method of chemical analysis of the person's blood, urine, or breath shall be made in accordance with §§ 5-65-204 and 5-65-206; or

(C) While passing a stopped school bus in violation of § 27-51-1004.

(2) A person who violates subdivision (a)(1) of this section is guilty of a Class C felony.

(b)(1) A person commits negligent homicide if he or she negligently causes the death of another person.

(2) A person who violates subdivision (b)(1) of this section is guilty of a Class A misdemeanor.

(c) As used in this section, "intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver therefore constitutes a clear and substantial danger of physical injury or death to himself or herself and other motorists or pedestrians.

History. Acts 1975, No. 280, § 1505; A.S.A. 1947, § 41-1505; Acts 1987, No. 538, § 1; 1999, No. 1112, § 1; 2001, No. 561, § 1; 2005, No. 1004, § 1; 2005, No. 2128, § 2.

Publisher's Notes. Acts 2005, No. 2128, § 1, provided: "This act shall be known and may be cited as 'Isaac's Law'."

Amendments. The 2001 amendment substituted "an alcohol concentration ...

§ 5-65-204" for "one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood" in (a)(1)(B).

The 2005 amendment by No. 1004 added the subdivision (i) designation in (a)(1)(B); and added (a)(1)(B)(ii).

The 2005 amendment by No. 2128 added (a)(1)(C) and made a related change.

RESEARCH REFERENCES

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Propriety of lesser included offense charge of voluntary manslaughter to jury in state murder prosecution — Twenty-first century cases. 3 A.L.R.6th 543.

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CASE NOTES

ANALYSIS

Accomplice or accessory.
 Burden of proof.
 Contributory negligence.
 Double jeopardy.
 Evidence.
 Instructions.
 Intoxication.
 Lesser included offenses.
 Multiple offenses.
 Murder or manslaughter.
 Reckless driving.
 Self-defense.
 Standard of care.

Accomplice or Accessory.

Defendant could be convicted as an accessory, when knowing intoxicated condition of employee, he instructed him to drive a truck. *Stacy v. State*, 228 Ark. 260, 306 S.W.2d 852 (1957) (decision under prior law).

Burden of Proof.

It being incumbent for the state to prove the corpus delicti, failure to prove the cause of death could be fatal to the state's case and although the state might have had the right to rely on the defendant's admission in open court that the deaths were the result of a collision between a large truck which he had left stalled on the road on a dark night and the car in which the decedents were riding, the state was not required to rely on such admission to establish the corpus delicti. *Williams v. State*, 229 Ark. 1022, 322 S.W.2d 86 (1959) (decision under prior law).

In a prosecution for negligent homicide the state was not required to prove that the defendant was the sole cause of the victim's death, only that he was a contributing cause. *Courtney v. State*, 14 Ark. App. 76, 684 S.W.2d 835 (1985).

Contributory Negligence.

Doctrine of contributory negligence held inapplicable. *Benson v. State*, 212 Ark. 905, 208 S.W.2d 767 (1948) (decision under prior law).

In a prosecution for negligent homicide contributory negligence by the victim would not lessen the defendant's culpability. *Courtney v. State*, 14 Ark. App. 76, 684 S.W.2d 835 (1985).

Double Jeopardy.

If defendant pleaded guilty to informa-

tion for drunken driving in justice of peace court, and was later charged with felony of involuntary manslaughter, plea of former jeopardy was not good, as drunken driving and homicide growing out of the same act were two separate offenses, related not by definition, but only by concurrence in time and space. *Campbell v. State*, 215 Ark. 785, 223 S.W.2d 505 (1949) (decision under prior law).

Driving while intoxicated is an essential component of the crime of negligent homicide, since it is necessary to prove that defendant was driving while intoxicated in order to prove that he had committed negligent homicide; consequently, a defendant cannot be convicted of both offenses. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

Evidence.

Evidence held sufficient to support conviction. *Edwards v. State*, 110 Ark. 590, 163 S.W. 155 (1914); *Phillips v. State*, 204 Ark. 205, 161 S.W.2d 747 (1942); *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *Flippo v. State*, 258 Ark. 233, 523 S.W.2d 390 (1975) (preceding decisions under prior law); *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

Evidence was sufficient to prove intoxication of the defendant where the investigating officers reported a strong smell of alcohol, the defendant struck the victim's horse trailer although it was parked well off the road, the defendant had bloodshot eyes, and the defendant refused to take a blood test. *Hatley v. State*, 68 Ark. App. 209, 5 S.W.3d 86 (1999).

Evidence held sufficient to establish negligent homicide arising from a head-on collision which occurred when a 15 year old defendant passed a logging truck and collided with oncoming vehicle where the defendant testified (1) that he had previously operated a vehicle on the same highway and was fairly familiar with the roads, as well as the double-yellow, no-passing lines, (2) that it was raining as he was following behind the logging truck for a couple of miles and that he had his mind set on passing the truck, (3) that although he was unable to see because of the mist and spray coming from the back of the logging truck, he still attempted to pass it as he crossed double yellow lines going up

a hill, and (4) that when he began to pass, the mist and spray only cleared when he was about "one-third of the way up the truck," and that was when he first saw the vehicle coming from the opposite direction over the crest of the hill. *Hunter v. State*, 341 Ark. 665, 19 S.W.3d 607 (2000).

Instructions.

Instruction regarding defendant's intoxication at the time of the killing was properly refused where it required a finding that the defendant acted willfully. *Nichols v. State*, 187 Ark. 999, 63 S.W.2d 655 (1933) (decision under prior law).

Refusal to give offered instruction on negligent homicide held error. *Langley v. State*, 261 Ark. 539, 549 S.W.2d 799 (1977); *Worrington v. State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981).

Where the defendant was found guilty of second degree murder, the trial court did not err in refusing to give an instruction of negligent homicide; it is not error to refuse to give an instruction on one lesser included offense if other lesser offenses were covered by the instructions given and the jury returned a verdict for the greater offense. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

Where the defendant admitted to purposely shooting the victim, there was no rational basis for a negligent homicide instruction. *McDonald v. State*, 42 Ark. App. 37, 852 S.W.2d 833 (1993).

Intoxication.

If the state proceeded against defendant first on driving while intoxicated charges and he were acquitted, the state would be collaterally estopped from proceeding against him in a second trial for negligent homicide; however, the same result does not apply when the two offenses are tried simultaneously. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Lesser Included Offenses.

Negligent homicide, which requires a lesser culpable mental state than manslaughter, is a lesser included offense of manslaughter. *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

Multiple Offenses.

Where three persons were killed as the result of being struck by a car driven by the defendant, the defendant was charged in three separate informations and was

tried and convicted for killing of one of the persons. *Holder v. Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949) (decision under prior law).

Murder or Manslaughter.

Subsection (a)(1) does not reflect a legislative intent that a person responsible for the death of another in an alcohol-related, vehicular accident must exclusively be charged with negligent homicide; by its plain wording, subsection (a)(1) expressly allows for murder or manslaughter charges to arise from a homicide involving the operation of an automobile. *Simmerson v. State*, 71 Ark. App. 16, 25 S.W.3d 439 (2000).

Reckless Driving.

For cases discussing negligent homicide by reckless driving, see *Bowen v. State*, 100 Ark. 232, 140 S.W. 28 (1911); *Madding v. State*, 118 Ark. 506, 177 S.W. 410 (1915); *Campbell v. State*, 215 Ark. 785, 223 S.W.2d 505 (1949); *Montague v. State*, 219 Ark. 385, 242 S.W.2d 697 (1951); *Lewis v. State*, 220 Ark. 914, 251 S.W.2d 490 (1952); *Roller v. State*, 225 Ark. 359, 283 S.W.2d 150 (1955); *Bentley v. State*, 252 Ark. 642, 480 S.W.2d 346 (1972) (preceding decisions under prior law).

That state might have prosecuted motorist for negligent homicide under § 27-50-307 did not preclude prosecution under former statute defining involuntary manslaughter. *Phillips v. State*, 204 Ark. 205, 161 S.W.2d 747 (1942) (decision under prior law).

State could have based its prosecution for negligent death by automobile under either former section defining involuntary manslaughter or under § 27-50-307. *Campbell v. State*, 215 Ark. 785, 223 S.W.2d 505 (1949) (decision under prior law).

Self-Defense.

One who slayed another under the honest belief that his life or limb was in imminent peril and acted to prevent the apprehended danger was in the exercise of a lawful act; but unless he acted with due caution and circumspection he was guilty of manslaughter. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937) (decision under prior law).

Standard of Care.

In a prosecution for homicide the state was required to prove a higher degree of

negligence than was ordinarily contemplated to establish liability in civil actions. *Benson v. State*, 212 Ark. 905, 208 S.W.2d 767 (1948) (decision under prior law).

An instruction containing the language of § 5-2-202 correctly and adequately defines the negligence required of this section. *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

Evidence held sufficient that jury could and did find that defendant should have been aware of the substantial and unjustifiable risk of harm under the circumstances and that the circumstances were such that his failure to perceive it involved a gross deviation from the standard of care that a reasonable person would observe in the same situation. *Phillips v. State*, 6 Ark. App. 380, 644 S.W.2d 288 (1982).

Cited: *Smith v. State*, 15 Ark. App. 266, 692 S.W.2d 622 (1985).

Beulah v. State, 352 Ark. 472, 101 S.W.3d 802 (2003).

5-10-106. Physician-assisted suicide.

(a)(1) As used in this section, “physician-assisted suicide” means a physician or health care provider participating in a medical procedure or willfully prescribing any drug, compound, or substance for the express purpose of assisting a patient to intentionally end the patient’s life.

(2) However, “physician-assisted suicide” does not apply to a person participating in the execution of a person sentenced by a court to death by lethal injection.

(b) It is unlawful for any physician or health care provider to commit the offense of physician-assisted suicide by:

(1) Prescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient’s life; or

(2) Assisting in any medical procedure for the express purpose of assisting a patient to intentionally end the patient’s life.

(c) Any physician or health care provider violating a provision of subsection (b) of this section is deemed guilty of a Class C felony.

(d) Nothing in this section prohibits a:

(1) Physician or health care provider from carrying out an advanced directive or living will; or

(2) Physician from prescribing any drug, compound, or substance for the specific purpose of pain relief.

History. Acts 1999, No. 394, § 1.

CHAPTER 11

KIDNAPPING AND RELATED OFFENSES

SECTION.

5-11-101. Definitions.

5-11-102. Kidnapping.

5-11-103. False imprisonment in the first degree.

5-11-104. False imprisonment in the second degree.

SECTION.

5-11-105. Vehicular piracy.

5-11-106. Permanent detention or restraint.

5-11-107. [Repealed.]

5-11-108. Trafficking of persons.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1995, No. 805, § 8: Mar. 28, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the safety of thousands of children who ride school buses to and from school and school-related activities is largely dependent upon motorists being alerted to the presence of the school bus and that recent research indicates the use of flashing white strobe lights on school buses will contribute significantly to warning motorists of a need for caution;

that electric crossing gates will provide greater visibility to a bus driver who can better see students crossing in front of the school bus; that recent incidents where armed individuals have stopped and boarded school buses for the purpose of robbing and terrorizing children on the bus are reflective of a rise in juvenile crime throughout Arkansas and that the immediate implementation of this act is necessary to better address the safety of all school children. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 ALR 4th 823.

Abduction of own child. 49 ALR 4th 7.

Am. Jur. 1 Am. Jur. 2d, Abduct., § 1 et seq.

C.J.S. 1 C.J.S., Abduct., § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-11-101. Definitions.

As used in this chapter:

(1) "Deviate sexual activity" means the same as defined in § 5-14-101;

(2)(A) "Incompetent" means that a person is unable to care for himself or herself because of physical or mental disease or defect.

(B) The status embraced by "incompetent" may or may not exist regardless of any adjudication concerning incompetency;

(3) "Restraint without consent" includes:

(A) Restraint by physical force, threat, or deception; or

(B) In the case of a person who is under fourteen (14) years of age or incompetent, restraint without the consent of a parent, guardian, or other person responsible for general supervision of his or her welfare;

(4) "Sexual contact" means the same as defined in § 5-14-101;

(5) "Sexual intercourse" means the same as defined in § 5-14-101; and

(6) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 1701; 1977, No. 360, § 5; A.S.A. 1947, § 41-1701.

CASE NOTES

Restraint Without Consent.

Where the defendant restrained the prosecutrix for the purpose of committing rape, and her children were restrained of their liberty by being kept in the car throughout the episode and the restraint was for the purpose of facilitating the commission of the principal offense, the proof was sufficient to support the three convictions of kidnapping. *Dyer v. State*, 290 Ark. 405, 720 S.W.2d 297 (1986).

There was sufficient evidence of restraint to sustain conviction for kidnapping where the victim was deceived into returning to the defendant's house. *Fairchild v. State*, 305 Ark. 406, 808 S.W.2d 743 (1991).

Evidence was sufficient to show restraint without consent where the defendant restrained the victim by threat of force with a firearm and the victim's hands were bound behind her back. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

Pursuant to subdivision (2) of this section and § 5-11-102(a)(1) and (4), the restraint employed by defendant exceeded that which was necessary to effectuate the rapes of the two victims and, thus, supported defendant's separate convictions for kidnapping because (1) defendant continued to hold his victims hostage after

the rapes were completed; (2) during the ordeal, defendant threatened, poked, slapped, and hit the victims both with his fist and with a vase; and (3) defendant not only raped the victims, but he demanded money from them as well. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004).

Where defendant used physical force against the victim to beat him to the point of unconsciousness, and then took him, without consent, to a remote location and left him there, the evidence was sufficient to convict defendant of kidnapping; the victim was restrained without his consent by physical force. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Where defendant car jacked a mother and her children, substantial evidence supported the Class Y kidnapping convictions where the victims were not released into safety the of a home but on an unfamiliar dark country road, the mother had been beaten, raped, and threatened with death, and she feared defendant might try to run over her when she was left alone on the road and, clearly, defendant had not known that a house was nearby. *Ratliff v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 753 (Dec. 2, 2004).

Cited: *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983); *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

5-11-102. Kidnapping.

(a) A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of:

(1) Holding the other person for:

(A) Ransom or reward; or

(B) Any other act to be performed or not performed for the other person's return or release;

(2) Using the other person as a shield or hostage;

(3) Facilitating the commission of any felony or flight after the felony;

(4) Inflicting physical injury upon the other person;

(5) Engaging in sexual intercourse, deviate sexual activity, or sexual contact with the other person;

(6) Terrorizing the other person or another person; or

(7) Interfering with the performance of any governmental or political function.

(b)(1) Kidnapping is a Class Y felony.

(2) However, kidnapping is a Class B felony if the defendant shows by a preponderance of the evidence that he or she or an accomplice voluntarily released the person restrained alive and in a safe place prior to trial.

History. Acts 1975, No. 280, § 1702; 1977, No. 474, § 15; 1981, No. 620, § 11; A.S.A. 1947, § 41-1702.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CASE NOTES

ANALYSIS

In general.
Construction.
Accomplice.
Attempt.
Class of felony.
Commission of felony.
Double jeopardy.
Elements of offense.
Evidence.
Indictment or information.
Instructions.
Jurisdiction.
Lesser included offenses.
Restraint.
Voluntary release of victim.

In General.

This section, in defining kidnapping, speaks in terms of restraint rather than removal. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Construction.

This section speaks in terms of restraint rather than removal; consequently, it reaches a greater variety of conduct, since restraint can be accomplished without any removal whatever. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

It is the quality and nature of the restraint, rather than the duration, that determines whether a kidnapping charge can be sustained; where the action of the accused substantially confines his victim in such a way that escape is made difficult or impossible, the fact that the restraint is of relatively brief duration does not necessarily remove it from the scope of this section. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

Accomplice.

There was sufficient proof defendant assisted in the commission of murder, kidnapping and attempted murder, where there was testimony he drove car in which victims were confined, assisted in confining them, and encouraged shootings of the victims. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

Evidence of kidnapping and rape held sufficient, even though a co-defendant actually committed the rape, where defendant entered victim's house first while brandishing a gun, tackled her, permitted her to be restrained with duct tape, and threatened to kill her if she looked at them. *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998).

Attempt.

The crime of attempted kidnapping is encompassed in this section and § 5-3-201. *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

Although defendant had a knife, a pair of handcuffs, duct tape, a leatherman-type tool, and gloves when he was arrested, the circumstantial evidence of defendant's intent to restrain the victim's liberty for the purpose of terrorizing or harming the victim was not overwhelming and defendant's conviction for attempted kidnapping, pursuant to subsection (a) of this section and § 5-3-201(a)(2), was reversed. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Class of Felony.

Defendant committed a Class Y kidnapping, rather than a Class B kidnapping, where the defendant took a 5-year-old girl

from the inside of a store to his house, sexually abused her, and then left her on the sidewalk outside, but around the corner from, the store. *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998).

Commission of Felony.

Where defendant was accused of kidnapping and another offense and was acquitted on the other charge did not make it impossible for him to be guilty of kidnapping, since to convict him of kidnapping it was only necessary to show that the victim was forceably taken for the purpose of committing a felony. *Black v. State*, 250 Ark. 604, 466 S.W.2d 463 (1971) (decision under prior law).

Where the state charged a kidnapping occurred either for the purpose of terrorizing the victim or for facilitating the commission of a felony, the jury did not have to find the kidnapping occurred in connection with a felony in order to convict the defendant for kidnapping. *Walters v. State*, 283 Ark. 243, 675 S.W.2d 364 (1984).

Double Jeopardy.

Being convicted of rape and kidnapping does not violate a defendant's right to be free from double jeopardy. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

Elements of Offense.

Among the factors from an act of rape that may be considered in determining whether a separate kidnapping conviction is supportable include whether the movement or confinement: (1) prevented the victim from summoning assistance; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996).

Evidence.

Evidence held sufficient to sustain conviction. *Black v. State*, 250 Ark. 604, 466 S.W.2d 463 (1971); *Guffey v. State*, 253 Ark. 720, 488 S.W.2d 28 (1972); *Martin v. State*, 258 Ark. 529, 527 S.W.2d 903 (1975); *McCraw v. State*, 262 Ark. 707, 561 S.W.2d 71 (1978) (preceding decisions under prior law); *Jackson v. State*, 290 Ark. 160, 717 S.W.2d 801 (1986); *Lewis v. State*, 295 Ark. 499, 749 S.W.2d 672 (1988); *Phills v. State*, 301 Ark. 265, 783 S.W.2d 348 (1990); *Vick v. State*, 301 Ark.

296, 783 S.W.2d 365 (1990); *Woods v. State*, 302 Ark. 512, 790 S.W.2d 892 (1990); *Fairchild v. State*, 305 Ark. 406, 808 S.W.2d 743 (1991); *Thomas v. State*, 311 Ark. 609, 846 S.W.2d 168 (1993); *McClure v. State*, 314 Ark. 35, 858 S.W.2d 103 (1993); *Chenowith v. State*, 321 Ark. 522, 905 S.W.2d 838 (1995); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001).

No corroborating testimony was necessary to prove crime of kidnapping. *Black v. State*, 250 Ark. 604, 466 S.W.2d 463 (1971) (decision under prior law).

To prove kidnapping, the state must only prove that the accused restrained the victim so as to interfere substantially with the victim's liberty, without the victim's consent, for a specific purpose outlined by this section. *Jackson v. State*, 290 Ark. 160, 717 S.W.2d 801 (1986).

Evidence held sufficient to support court's refusal to find defendant unfit for trial. *Dyer v. State*, 290 Ark. 405, 720 S.W.2d 297 (1986).

Evidence of marginal relevance admitted. *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986).

Proof of one's purpose or motive for an abduction is an essential element of the offense of kidnapping, and proof of the identity of the assailant is essential to conviction. *Crutchfield v. State*, 25 Ark. App. 227, 763 S.W.2d 94 (1988).

Voice identification was sufficient. *White v. State*, 303 Ark. 30, 792 S.W.2d 867 (1990).

There was substantial evidence to support the defendant's conviction of a Class Y kidnapping offense inasmuch as he did not voluntarily release his victim. *Wells v. State*, 303 Ark. 471, 798 S.W.2d 61 (1990).

Evidence held insufficient to sustain conviction. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

The instrumentality used to inflict fear is patently relevant to crimes of rape, kidnapping and aggravated robbery, all of which include an element of force for perpetration. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Knife found at crime site was relevant to corroborate the testimony of the victim concerning stabbings and no prejudice resulted to the defendant from its admission into evidence. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Evidence held sufficient where defendant's use of physical force against the victim led to an inference that he intended to cause her physical harm and the questions defendant asked the victim regarding her marital status and her state of loneliness led to the inference that he was considering sexual contact with the victim. *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

It was sufficient to support the charge that the victim was kidnapped when she was forced to the rear of the store and bound to a chair. *Neely v. State*, 317 Ark. 312, 877 S.W.2d 589 (1994).

Although defendant was obliged to abort his robbery of a small store, the evidence of kidnapping, aggravated robbery, and attempted murder held sufficient. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995).

Where defendant dragged the victim for approximately one city block from a lighted city street to a dark and secluded area, defendant allowed the rape to be carried out more easily and decreased his risk of being caught, and where defendant strangled the victim to keep her from summoning assistance, the restraint employed exceeded that which was necessary to effectuate the crime of rape, and thus supported a separate conviction for kidnapping. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996).

Where defendant used physical force against the victim to beat him to the point of unconsciousness, and then took him, without consent, to a remote location and left him there, the evidence was sufficient to convict defendant of kidnapping; the victim was restrained without his consent by physical force. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Defendant's kidnapping conviction was proper pursuant to subdivision (a)(3) of this section where defendant duct-taped the victim's hands behind her back while he was robbing and fleeing from the liquor store. *Lowe v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 344 (May 27, 2004).

Evidence presented supported the kidnapping conviction where the victim said defendant robbed and kidnapped him after coming to his home with three other individuals; after duct-taping victim's mouth and arms, they forced him at gunpoint to accompany them to defendant's

home and robbed him of \$2,040 cash that he had on his person. *Carter v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Evidence showing that appellant formed a plan to lure the victim into his vehicle with the purpose of injuring or killing him, and that the victim died under circumstances manifesting extreme indifference to the value of human life, was sufficient to support appellant's conviction of capital felony murder, with the underlying charge of kidnapping. *Ridling v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 58 (Jan. 27, 2005).

Indictment or Information.

Where the information originally charged that the defendant unlawfully restrained the victim so as to interfere substantially with her liberty for the purpose of engaging in sexual intercourse or deviate sexual activity, and the trial court allowed the state at the close of its case to amend the information to include the allegation that the defendant proposed to engage in sexual contact with the victim, the amendment was proper. *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982).

Instructions.

Instruction that kidnapping included the taking of a person into another state or territory and transporting a person for the purpose of thwarting arrest or detention held not inherently erroneous. *Hale v. State*, 246 Ark. 989, 440 S.W.2d 550 (1969) (decision under prior law).

Jurisdiction.

State court held to have jurisdiction to hear evidence relating to the defendant's activity in another state where the evidence of such activity was necessary to prove a requisite element of the kidnapping charge which had been filed against him in Arkansas. *Smith v. Housewright*, 667 F.2d 689 (8th Cir. 1981), cert. denied, 456 U.S. 978, 102 S. Ct. 2245, 72 L. Ed. 2d 853 (1982).

Lesser Included Offenses.

None of the crimes of rape, burglary or kidnapping is necessarily a lesser included offense of the other, since all involve separate elements, and it is not necessary to prove one offense in order to prove another. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Handy v.*

State, 24 Ark. App. 122, 749 S.W.2d 683 (1988).

Refusal to instruct the jury on lesser included offense held proper. *Walters v. State*, 283 Ark. 243, 675 S.W.2d 364 (1984).

Kidnapping and rape are not lesser included offenses of one another because each crime requires a different element of proof. While kidnapping does require the restraint to be substantial for one of several purposes, one of which is the purpose of engaging in sexual intercourse, kidnapping does not require the act of sexual intercourse itself. Rape requires a sexual act by forcible compulsion; that force is not necessarily the same as that required to sustain a conviction for kidnapping. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

Where the victim was forced to drive to the county where she was repeatedly raped, her life was threatened several times although she was not seriously injured physically, and after the rape the victim was tied to a tree, the crime of rape and kidnapping were separate. *Jones v. State*, 290 Ark. 113, 717 S.W.2d 200 (1986).

A kidnapping which qualifies as a Class B felony is not a lesser included offense of a kidnapping which constitutes a Class Y felony. Rather, the offense is still kidnapping, even when there is a voluntary, safe release of the victim. *Woods v. State*, 302 Ark. 512, 790 S.W.2d 892 (1990).

Restraint.

When the restraint exceeds that normally incident to the crime of rape or robbery, the perpetrator should also be subject to prosecution for kidnapping. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Frensley v. State*, 291 Ark. 268, 724 S.W.2d 165 (1987); *Smith v. State*, 318 Ark. 142, 883 S.W.2d 837 (1994).

There was held to be clearly evidence of more than the minimal restraint which necessarily accompanies the crime of rape, and the evidence clearly formed the basis for the two separate crimes of rape and kidnapping. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

It is not necessary that a victim be captured or held at gunpoint for the offense of kidnapping to be established under this section; to prove kidnapping the

state must only prove that the accused restrained the victim so as to interfere substantially with the victim's liberty, without the victim's consent, for a specific purpose outlined by the statute. *Ellis v. State*, 279 Ark. 430, 652 S.W.2d 35 (1983).

It is the quality and nature of the restraint, rather than the duration, that determines whether a kidnapping charge can be sustained. *Cook v. State*, 284 Ark. 333, 681 S.W.2d 378 (1984).

Whether or not the actor was able to complete the objective of the kidnapping is immaterial; once the kidnapper has undertaken the activity and the victim has been exposed to the attendant dangers, the act of kidnapping is complete. *Cook v. State*, 284 Ark. 333, 681 S.W.2d 378 (1984).

Evidence held sufficient so that a finding of substantial interference with the victim's liberty could be supported despite its relatively brief duration. *Cook v. State*, 284 Ark. 333, 681 S.W.2d 378 (1984).

Evidence of the use of a gun was relevant, although not essential, to a charge of kidnapping, which contains the element of restraint without consent. *Hickerson v. State*, 286 Ark. 450, 693 S.W.2d 58 (1985).

Evidence held sufficient to sustain a jury's finding that defendant substantially interfered with victim's liberty. *Hickey v. State*, 14 Ark. App. 50, 684 S.W.2d 830 (1985).

Substantial interference with the liberty of another person does not necessarily require that the interference be for a substantial period of time. *Jackson v. State*, 290 Ark. 160, 717 S.W.2d 801 (1986); *Green v. State*, 313 Ark. 87, 852 S.W.2d 110 (1993).

Where the defendant restrained the prosecutrix for the purpose of committing rape, and her children were restrained of their liberty by being kept in the car throughout the episode and the restraint was for the purpose of facilitating the commission of the principal offense, the proof was sufficient to support the three convictions of kidnapping. *Dyer v. State*, 290 Ark. 405, 720 S.W.2d 297 (1986).

The exclusion of de minimis restraints from the definition of kidnapping is desirable since offenses such as rape or robbery necessarily contemplate restrictions on the victim's liberty while the crime is actually committed. Thus, it is only when the restraint exceeds that normally inci-

dental to the crime that the rapist (or robber) should also be subject to prosecution for kidnapping. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Chasing and dragging the victim from room to room or building to building and forcefully engaging in acts of rape between victim's attempts at freedom involved restraint more than that normally incidental to the crime of rape, and warranted the finding that the defendant kidnapped his victim before and between the acts of rape. *Harris v. State*, 299 Ark. 433, 774 S.W.2d 121 (1989).

Where evidence showed the restraint on rape victim's liberty to have exceeded that which was incidental to the rape, conviction of kidnapping was also proper. *Thomas v. State*, 311 Ark. 609, 846 S.W.2d 168 (1993).

Evidence of restraint shown exceeded the restraint necessary to prove the crime of rape; thus, the defendant was also subject to prosecution for kidnapping. *Aaron v. State*, 312 Ark. 19, 846 S.W.2d 655 (1993).

Where there was no evidence that defendant interfered with the victim's liberty to an extent beyond that which was incidental to the underlying crimes of battery and theft, there was insufficient evidence to support a judgment of conviction for kidnapping. *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993).

An offense such as rape necessarily contemplates restrictions on the victim's liberty while the crime is being committed; therefore, only when the restraint imposed exceeds that normally incidental to the underlying crime should the rapist also be subject to prosecution for kidnapping. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

This section speaks in terms of restraint rather than removal; consequently, it reaches a greater variety of conduct, since restraint can be accomplished without any removal whatsoever. *Smith v. State*, 318 Ark. 142, 883 S.W.2d 837 (1994).

Evidence was sufficient to show restraint where the victim was forced to stay in a house during a beating, was removed to another location with his hands tied, and was prevented from leaving a house in the new location. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999), cert. denied, 528 U.S. 933, 120 S. Ct. 334, 145 L. Ed. 2d 261 (1999).

Defendant's restraint of the victim was not incidental to the rape and was sufficient to satisfy the restraint without consent element of the offense of kidnapping; although the victim willingly entered defendant's car, defendant restrained her liberty without her consent prior to the rape by forcing her at gunpoint to go with him to his home rather than letting her get out of his car at her friend's house. *Marbley v. State*, 81 Ark. App. 165, 100 S.W.3d 48 (2003).

Pursuant to § 5-11-101(2) and subdivisions (a)(1) and (4) of this section, the restraint employed by defendant exceeded that which was necessary to effectuate the rapes of the two victims and, thus, supported defendant's separate convictions for kidnapping because (1) defendant continued to hold his victims hostage after the rapes were completed; (2) during the ordeal, defendant threatened, poked, slapped, and hit the victims both with his fist and with a vase; and (3) defendant not only raped the victims, but he demanded money from them as well. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004).

Voluntary Release of Victim.

Defendant held not entitled to have the penalty ranges of the kidnapping offense reduced from a Class Y felony to a Class B felony under subsection (b), where the defendant did not voluntarily release the victim, nor was the victim left in what could reasonably be characterized as a safe place. *Whitt v. State*, 281 Ark. 466, 664 S.W.2d 876 (1984).

Victims who were left handcuffed to immovable structures, and thus dependent on being discovered and freed before their release was complete, were not released, and sentencing as a Class Y rather than a Class B felony was proper. *Clark v. State*, 292 Ark. 69, 727 S.W.2d 853 (1987).

Victim was not released in a safe place given the physical condition in which she was left; the only safe place that the victim could have been released was the hospital. *Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995).

Evidence was sufficient to support defendant's conviction for kidnapping, and whether defendant released the victim at a place of safety was a fact question properly submitted to the jury; however, defendant failed to prove that he released the victim in a safe place where he took the

victim to the hospital after he ran over her leg and remained with her constantly. *Morgan v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 598 (Oct. 14, 2004).

Where defendant car jacked a mother and her children, substantial evidence supported the Class Y kidnapping convictions where the victims were not released into safety the of a home but on an unfamiliar dark country road, the mother had been beaten, raped, and threatened with death, and she feared defendant might try to run over her when she was left alone on the road and, clearly, defendant had not known that a house was nearby. *Ratliff v.*

State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 753 (Dec. 2, 2004).

Cited: *Griffin v. State*, 276 Ark. 266, 633 S.W.2d 708 (1982); *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983); *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985); *Garmon v. State*, 290 Ark. 371, 719 S.W.2d 699 (1986); *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993); *Hardaway v. State*, 321 Ark. 576, 906 S.W.2d 288 (1995); *Morris v. State*, 53 Ark. App. 183, 920 S.W.2d 508 (1996); *Avery v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 836 (Nov. 16, 2005).

5-11-103. False imprisonment in the first degree.

(a) A person commits the offense of false imprisonment in the first degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty in a manner that exposes the other person to a substantial risk of serious physical injury.

(b) False imprisonment in the first degree is a Class C felony.

History. Acts 1975, No. 280, § 1703; A.S.A. 1947, § 41-1703.

CASE NOTES

Restraint.

While the restraint used in a kidnapping and rape must exceed that which is "normally incidental" to the commission of rape only, the kind of restraint that is considered incident to a rape is that which is necessary to consummate the act; any additional restraint will support a conviction for kidnapping. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

There was substantial evidence to support the jury's finding that defendant committed the crime of false imprisonment of

her daughter by exercising excessive and unreasonable restraint that created a substantial risk of serious physical injury; there was no merit to defendant's argument that, as a parent, she could not be held liable for criminal conduct committed against her daughter because she had the lawful authority to consent to restraint of her child. *Dick v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 713 (Nov. 17, 2005).

Cited: *Spillers v. State*, 268 Ark. 217, 595 S.W.2d 650 (1980).

5-11-104. False imprisonment in the second degree.

(a) A person commits the offense of false imprisonment in the second degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty.

(b) False imprisonment in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1704; A.S.A. 1947, § 41-1704.

Cross References. Detention of shoplifting suspects, § 5-36-116.

CASE NOTES**ANALYSIS**

Burden of proof.
Evidence.
Instructions.
Lawful authority.
Restraint.

Burden of Proof.

Where imprisonment was proved or admitted under an arrest without a warrant, the burden of justification was on the defendant. *Saint Louis, I.M. & S. Ry. v. Waters*, 105 Ark. 619, 152 S.W. 137 (1912). See also *Haglin v. Apple*, 65 Ark. 274, 45 S.W. 989 (1898); *Douglass v. Stahl*, 71 Ark. 236, 72 S.W. 568 (1903) (preceding decisions under prior law).

Evidence.

Evidence insufficient to support conviction. *H.K. Faulkinbury v. United States Fire Ins. Co.*, 247 Ark. 70, 444 S.W.2d 254 (1969) (decision under prior law).

Instructions.

Instruction that, though the conductor who made the arrest was the judge as to whether the plaintiff was intoxicated when arrested, yet if he was mistaken the company would be liable, was erroneous, as it ignored the question whether the conductor acted in good faith. *Saint Louis, I.M. & S. Ry. v. Hudson*, 95 Ark. 506, 130 S.W. 534 (1910) (decision under prior law).

Lawful Authority.

Imprisonment by virtue of a legal writ

in due form issued by a court of competent jurisdiction and served in a lawful manner did not constitute false imprisonment even though it was improvidently or wrongfully issued. *Campbell v. Hyde*, 92 Ark. 128, 122 S.W. 99 (1909) (decision under prior law).

An action for false imprisonment under a wrongful arrest did not lie where the arrest complained of was under lawful authority. *McIntosh v. Bullard, Earnheart & Magness*, 95 Ark. 227, 129 S.W. 85 (1910) (decision under prior law).

Restraint.

By the unlawful imprisonment of one's person, even though for only a moment, there was an actionable wrong. *Saint Louis, I.M. & S. Ry. v. Wilson*, 70 Ark. 136, 66 S.W. 661 (1902) (decision under prior law).

A prisoner who had been pardoned by the governor was immediately entitled to his freedom and when it was denied the prisoner, the prisoner could maintain an action for false imprisonment against the one denying him his liberty. *Weigel v. McCloskey*, 113 Ark. 1, 166 S.W. 944 (1914) (decision under prior law).

Where a deputy, under color of authority helped parent remove children from the other parent's custody against their will, officer's coercive acts constituted false imprisonment. *Pettijohn v. Smith*, 255 Ark. 780, 502 S.W.2d 618 (1973) (decision under prior law).

5-11-105. Vehicular piracy.

(a) A person commits vehicular piracy if, without lawful authority, the person seizes or exercises control, by force or threat of violence, over any:

(1) Aircraft occupied by an unconsenting person; or

(2) Other vehicle:

(A) Having a seating capacity of more than eight (8) passengers;

(B) Operated by a common carrier or contract carrier of passengers for hire; and

(C) Occupied by an unconsenting person.

(b)(1) Vehicular piracy of an aircraft is a Class B felony.

(2) Otherwise, vehicular piracy is a Class C felony.

History. Acts 1975, No. 280, § 1705;
A.S.A. 1947, § 41-1705.

CASE NOTES

Evidence.

Vehicular piracy under subdivision (a)(1) of this section shown where defendant threatened to kill everyone at an airport office if the pilot refused to return to the airport and land the plane; defen-

dant exercised control over the aircraft through a threat of violence to the pilot's wife and others, making the pilot a non-consenting occupant of the plane. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

5-11-106. Permanent detention or restraint.

(a) A person commits the offense of permanent detention or restraint if, without consent and without lawful authority, the person restrains a person with the purpose of holding or concealing the other person:

(1) Without ever releasing the other person; or

(2) Without ever returning the other person to the person or institution from whose lawful custody the other person was taken.

(b)(1) Permanent detention or restraint is a Class B felony.

(2) However, permanent detention or restraint is a Class D felony if the person detained or restrained is the child of the defendant.

History. Acts 1975, No. 280, § 1706, as added by Acts 1977, No. 360, § 6; A.S.A. 1947, § 41-1706.

CASE NOTES

Return to Person or Institution with Custody.

Evidence was sufficient to find that the defendant took an incompetent person

with the purpose of not returning that person to the legal guardian. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996).

5-11-107. [Repealed.]

Publisher's Notes. This section, concerning school bus piracy, was repealed by Acts 2005, No. 1994, § 511. The section

was derived from Acts 1995, No. 805, §§ 1, 4.

5-11-108. Trafficking of persons.

(a) As used in this section:

(1) "Debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of the personal services of a person under his or her control as a security for debt, if:

(A) The value of the debtor's personal services or of the personal services of a person under his or her control as reasonably assessed is not applied toward the liquidation of the debt; or

(B) The length and nature of the debtor's personal services or of the personal services of a person under his or her control are not respectively limited and defined;

(2) "Involuntary servitude" means a condition of servitude induced by means of:

(A) Any scheme, plan, or pattern of behavior intended to cause a person to believe that if he or she does not enter into or continue the servitude, he or she or another person will suffer serious physical injury or physical restraint; or

(B) The abuse or threatened abuse of the legal process;

(3) "Peonage" means holding a person against his or her will to pay off a debt; and

(4) "Sexual conduct" means the same as defined in § 5-27-401.

(b) A person commits the offense of trafficking of persons if he or she:

(1) Recruits, harbors, transports, or obtains a person for labor or services through the use of force, fraud, or coercion for the purpose of subjecting the person to:

(A) Involuntary servitude;

(B) Peonage;

(C) Debt bondage;

(D) Slavery;

(E) Marriage;

(F) Adoption; or

(G) Sexual conduct; or

(2) Benefits financially or benefits by receiving anything of value from participation in a venture under subdivision (b)(1) of this section.

(c) Trafficking of persons is a Class A felony.

History. Acts 2005, No. 2267, § 1.

CHAPTER 12

ROBBERY

SECTION.

5-12-101. Definition.

5-12-102. Robbery.

SECTION.

5-12-103. Aggravated robbery.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Theft, § 5-36-101 et seq.

Effective Dates. Acts 1979, No. 1118, § 4: became law without Governor's signature, May 11, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present penalties for aggravated robbery

committed with a deadly weapon do not adequately deter persons from committing this crime and that this crime is rapidly increasing in frequency, and that this Act is immediately necessary to attempt to decrease the incidence of this crime. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Coercion, compulsion, or duress as defense to charge of robber, larceny, or

related crime. 1 ALR 4th 481.

Dog as deadly or dangerous weapon for

purposes of statutes aggravating offenses such as assault and robbery. 7 ALR 4th 607.

Cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 ALR 4th 842.

Human body parts other than feet as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR 4th 1268.

Am. Jur. 67 Am. Jur. 2d, Robbery, § 1 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

Robbery Statute Revised: An Analysis of the Code Approach, 30 Ark L. Rev. 209.

C.J.S. 77 C.J.S., Robbery, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-12-101. Definition.

As used in this chapter, “physical force” means any:

- (1) Bodily impact, restraint, or confinement; or
- (2) Threat of any bodily impact, restraint, or confinement.

History. Acts 1975, No. 280, § 2101; A.S.A. 1947, § 41-2101.

CASE NOTES

Physical Force.

Evidence held sufficient to show that defendant employed physical force against the victim, inasmuch as there was sufficient restraint and bodily impact to constitute physical force. *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980).

Evidence sufficient to find that the force exerted was sufficient to accomplish its purpose. *Turner v. State*, 270 Ark. 969, 606 S.W.2d 762 (1980).

Testimony by store employees that they ran after and tackled defendant after seeing him take an item from the store without paying for it implied that some type of physical force was used against them, even if one of the employees was the person who used physical force first, and was sufficient to prove the use of physical force element. *Payne v. State*, 86 Ark. App. 59, 159 S.W.3d 804 (2004).

For purposes of this section, it was

immaterial whether defendant ever intended to use physical force against the victim to further his escape; physical force meant any bodily impact, and the testimony from the victim was that defendant struck him in the nose, which was corroborated by a police officer and believed by the jury. *McElyea v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 467 (June 23, 2004).

Cited: *Tippitt v. Lockhart*, 859 F.2d 595 (8th Cir. 1988); *Baldwin v. State*, 48 Ark. App. 181, 892 S.W.2d 534 (1995); *Boyd v. State*, 54 Ark. App. 17, 922 S.W.2d 357 (1996).

Defendant used physical force to get away from a store employee who had caught him shoplifting and told him that a report needed to be filed where defendant struck the employee when the employee grabbed his sleeve. *McElyea v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 2 (Jan. 6, 2005).

5-12-102. Robbery.

(a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person.

(b) Robbery is a Class B felony.

History. Acts 1975, No. 280, § 2103; A.S.A. 1947, § 41-2103; Acts 1987, No. 934, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Bank Not Liable for Attack on ATM Patron: Boren v. Worthen National Bank of Arkansas, 50 Ark. L. Rev. 521.

ALR. Robbery: Identification of victim as person named in indictment or information. 4 A.L.R.6th 577.

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

Survey — Criminal Law, 10 UALR L.J. 559.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Purpose.

Accomplice.

Assistance of counsel.

Double jeopardy.

Elements.

Evidence.

Force or intimidation.

Indictment or information.

Jurisdiction.

Lesser included offenses.

Ownership.

Physical force.

Sentence.

Theft distinguished.

Threat of force.

Value.

Constitutionality.

This section is not unconstitutionally vague as it clearly states that a defendant is responsible for the use of force on anyone either before, during, or after the theft. Becker v. State, 298 Ark. 438, 768 S.W.2d 527 (1989).

In General.

Under prior law, definition of robbery put the primary emphasis upon the taking of property, but the code redefines robbery to shift the focus of the offense from the taking of property to the threat of physical harm to the victim. Jarrett v. State, 265 Ark. 662, 580 S.W.2d 460 (1979).

Section has redefined robbery so that focus of robbery has shifted from the taking of property to threat of physical harm to victim; one consequence of definition is that offense is complete when physical

force is threatened and no transfer of property need take place. Birchett v. State, 294 Ark. 176, 741 S.W.2d 267 (1987); McKinzy v. State, 313 Ark. 334, 853 S.W.2d 888 (1993).

The crime of robbery is serious, and violence is generally involved. Myers v. State, 317 Ark. 70, 876 S.W.2d 246 (1994).

Purpose.

The clear legislative intent was to define robbery so as to cover situations where persons who have committed a theft choose to employ force to avoid arrest. Williams v. State, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Accomplice.

If the evidence showed that defendant aided or advised another in planning or committing a robbery but that the other person committed the greater inclusive offense of aggravated robbery, defendant's liability would be limited to the lesser included offense of robbery. Savannah v. State, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Assistance of Counsel.

Where the state's proof of guilt was overwhelming, despite the defense testimony that the defendant was simply standing quietly in the store when the two employees seized her, the defense counsel's failure to object to the bailiff's testimony that a codefendant had fled four years earlier when placed under arrest did not substantially prejudice the defendant and did not amount to ineffective assistance of counsel. Williams v. State, 289 Ark. 567, 712 S.W.2d 924 (1986).

Double Jeopardy.

A former acquittal on a bank robbery

charge was no bar to prosecution for burglarizing a bank building where the offenses were separate and distinct and not dependent upon the same evidence to support the conviction. *Whitted v. State*, 187 Ark. 285, 59 S.W.2d 597 (1933) (decision under prior law).

The aggravating circumstance providing that the murder was committed for the purpose of avoiding or preventing an arrest, under § 5-4-604(5), does not unconstitutionally duplicate an element of the underlying felony of robbery under this section; since avoiding arrest is not necessarily an invariable motivation for killing, the aggravating circumstance of avoiding arrest does not as a matter of logic necessarily duplicate an element of the underlying capital crime of robbery. *Whitmore v. Lockhart*, 834 F. Supp. 1105 (E.D. Ark. 1992), *aff'd*, 8 F.3d 614 (8th Cir. 1993).

Elements.

To constitute robbery the taking had to be either directly from the person or in the presence of the party robbed, and had to be by force or a previous putting in fear. *Clary v. State*, 33 Ark. 561 (1878) (decision under prior law).

The elements of the crime of robbery are (1) intent to commit theft and (2) the employment of or threat to employ physical force. *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977).*

Stealing hubcaps from a parked car is not robbery. *Wesley v. State*, 265 Ark. 406, 578 S.W.2d 895 (1979).

A person commits robbery if he employs physical force in attempting to commit a theft or if he employs physical force in resisting apprehension immediately after committing a theft. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Where the defendant held the victim at gunpoint while he inspected her jewelry, the jury was justified in concluding that the defendant intended to commit theft. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

The motive of pecuniary gain is an element of robbery even though it does not appear in the literal language of this section. *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), *cert. denied*, 493 U.S. 959, 110 S. Ct. 378, 107 L. Ed. 2d 363 (1989).

A transfer of property is essential for

the completion of the crime of theft; on the other hand no transfer of property is required for the completion of the crime of robbery, only physical force or the threat of physical force is necessary. *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990).

The robbery and murder did not have to occur within a brief interval of time to support a capital murder conviction. *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991).

Nothing in this section or § 5-12-103 requires that the representation that the offender is armed must be made to the victim of the theft. *Lowe v. State*, 36 Ark. App. 85, 819 S.W.2d 23 (1991).

Robbery does not require that each victim, or even one victim, be deprived of property, but has been redefined by shifting the emphasis from the taking of property to the threat, express or implied, of physical harm to the victim. *Harris v. State*, 308 Ark. 150, 823 S.W.2d 860 (1992).

Trial court's application of *Smith* to an aggravated robbery charge and reduction of the conviction to robbery was erroneous because the state did not have to show that the firearm had been used as a firearm, and evidence that clearly showed that defendant employed or threatened to employ physical force while he was armed with a deadly weapon was sufficient for a conviction. *Carter v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Evidence.

Evidence held sufficient to establish that the defendant was guilty of larceny (now theft) and not robbery. *Bowlin v. State*, 72 Ark. 530, 81 S.W. 838 (1904) (decision under prior law).

Evidence held sufficient to support a conviction. *Shell v. State*, 84 Ark. 344, 105 S.W. 575 (1907); *Jenkins v. State*, 191 Ark. 507, 87 S.W.2d 60 (1935); *Trotter v. State*, 215 Ark. 121, 219 S.W.2d 636 (1949); *Taylor v. State*, 230 Ark. 809, 327 S.W.2d 6 (1959); *Norman v. State*, 236 Ark. 476, 366 S.W.2d 891, *cert. denied*, 375 U.S. 933, 84 S. Ct. 337, 11 L. Ed. 2d 265 (1963); *Hurst v. State*, 251 Ark. 40, 470 S.W.2d 815 (1971); *Guffey v. State*, 253 Ark. 720, 488 S.W.2d 28 (1972); *Lloyd v. State*, 253 Ark. 839, 489 S.W.2d 240 (1973); *Graves v. State*, 256 Ark. 117, 505 S.W.2d 748

(1974); *Ferguson v. State*, 257 Ark. 1036, 521 S.W.2d 546 (1975) (preceding decisions under prior law); *Wilson v. State*, 262 Ark. 339, 556 S.W.2d 657 (1977); *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980); *Lane v. State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986); *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986); *Dees v. State*, 30 Ark. App. 124, 783 S.W.2d 372 (1990); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991); *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143, 116 S. Ct. 1436, 134 L. Ed. 2d 558 (1996); *Whitfield v. State*, 70 Ark. App. 451, 20 S.W.3d 422 (2000).

Defendant's conduct did not indicate that defendant was renouncing an intent to commit theft. *White v. State*, 271 Ark. App. 692, 610 S.W.2d 266 (1981).

Evidence held sufficient to find that the only purpose defendants could have had was to rob the victim. *Johnson v. State*, 276 Ark. 56, 632 S.W.2d 416 (1982); *Becker v. Lockhart*, 971 F.2d 172 (8th Cir. 1992), cert. denied, 510 U.S. 830, 114 S. Ct. 98, 126 L. Ed. 2d 65 (1993).

Evidence held sufficient to establish a theft and the use of force immediately after the theft to resist arrest. *Becker v. State*, 298 Ark. 438, 768 S.W.2d 527 (1989); *Becker v. Lockhart*, 971 F.2d 172 (8th Cir. 1992), cert. denied, 510 U.S. 830, 114 S. Ct. 98, 126 L. Ed. 2d 65 (1993).

The only reasonable inference to be drawn was that defendant intended to take property from the victim where he approached the victim and said, "This is a robbery," appeared to have a pistol in his pocket and had it pointed at her, and when she screamed for help, he ran away. *Fletcher v. State*, 306 Ark. 541, 816 S.W.2d 592 (1991).

The evidence was sufficient to establish that the threat of a deadly weapon was made immediately after the theft to resist apprehension or arrest, where the theft, flight, struggle, and apprehension were accomplished in a matter of minutes without any significant intervening event. *Lowe v. State*, 36 Ark. App. 85, 819 S.W.2d 23 (1991).

Victim's pretrial and in-court identifications of the defendant were unequivocal and clearly constituted sufficient evidence for the jury to conclude without having to speculate that defendant was the perpe-

trator. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994).

Identification testimony and the physical evidence accidentally dropped at the scene by the defendant were admissible, and evidence was sufficient to sustain the conviction of rape, burglary, and robbery. *Monk v. State*, 320 Ark. 189, 895 S.W.2d 904 (1995).

Substantial evidence supported a conviction for aggravated robbery, notwithstanding that the defendant never produced a weapon in the victim's view, where (1) he represented that he had a knife and would cut the victim's throat unless she complied with his demands, (2) he admitted to having a butcher knife while committing the robbery, and (3) a butcher knife was recovered from the defendant. *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999).

Evidence was sufficient to show that the defendant used force for the purpose of committing a theft where he had stolen property from the victim only hours earlier, voiced his intent to return to her home to get more money, and then followed through by going to her home during the early hours of morning where he physically attacked the victim when she stepped outside, and stopped the attack only when her daughter made her presence known by screaming. *Pond v. State*, 69 Ark. App. 346, 14 S.W.3d 525 (2000).

Evidence was sufficient to convict defendant of aggravated robbery and theft where the record showed that after the victim was shot, the defendant removed money from the dead man's body, helped to hide the body, hid the dead man's truck, and threw the dead man's wallet and keys away. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Where defendant used physical force against the victim, the jury could infer his intent to commit a felony or misdemeanor theft from the victim's testimony that his shoes and clothes were missing, and that defendant and his accomplice took the victim's truck, leaving him abandoned in a remote field; the evidence was sufficient to support defendant's conviction for robbery. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Victim's testimony was sufficient in and of itself to sustain defendant's convictions for aggravated robbery and battery in the

first degree because the victim was cross-examined at length by defense counsel regarding the inconsistencies in his testimony but remained adamant that defendant was the person who had come into his house and told him to "break yourself"; in addition, the victim also identified defendant in a photo lineup and identified him again at trial. *Mosley v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 512 (June 30, 2004).

Jury could infer that defendant shot the victim in order to steal drugs and money from the victim, based on defendant's own account of what occurred; thus, there was substantial evidence that defendant shot and killed the victim during the course of, and in furtherance of, an aggravated robbery. *Harper v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 555 (Oct. 7, 2004).

Evidence was sufficient to sustain defendant's aggravated robbery conviction where defendant admitted to being in the vehicle when the crimes occurred, the evidence showed that he was the driver, defendant waited while an accomplice fired shots at the van's driver, and defendant retrieved the bank bag. *Jefferson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 726 (Nov. 18, 2004).

Sufficient evidence existed to convict defendant of robbery where defendant struck a store employee after the employee caught him shoplifting and told defendant a report had to be filed; defendant used physical force to avoid apprehension. *McElyea v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 2 (Jan. 6, 2005).

State presented sufficient evidence to prove either robbery or aggravated robbery where the victim testified that defendant and his friends came to the victim's residence and, after duct-taping his mouth and arms, forced him at gunpoint to accompany them to defendant's home where defendant then took \$ 2,040 cash that the victim had on his person; further, the victim maintained at trial that defendant and his friends continually beat him from the time they kidnapped him until they returned him to his home. *Carter v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Force or Intimidation.

Snatching money from another's hand without force was not robbery. *Rutt v.*

State, 61 Ark. 594, 34 S.W. 262 (1896); *Coon v. State*, 109 Ark. 346, 160 S.W. 226 (1913) (preceding decisions under prior law).

It was not essential that both force and intimidation be employed to constitute robbery. *Jenkins v. State*, 191 Ark. 507, 87 S.W.2d 60 (1935) (decision under prior law).

Where the statutes made intimidation or putting in fear the person robbed an element of the offense of robbery, it was proper that the state of mind of the person robbed be proved in order to show that all the elements of the offense were present. *Miller v. State*, 230 Ark. 352, 322 S.W.2d 685 (1959) (decision under prior law).

If either force or intimidation was employed to obtain money from an elderly couple the requisites of the former robbery statute were met and taking into consideration the age of the couple, the intimidation necessary to complete the offense was not nearly so great as would be necessary to complete the offense if the victims were younger people. *Miller v. State*, 230 Ark. 352, 322 S.W.2d 685 (1959) (decision under prior law).

Testimony held sufficient to show intimidation. *Ferguson v. State*, 257 Ark. 1036, 521 S.W.2d 546 (1975) (decision under prior law).

While mere snatching of money or goods from the hand of another was not robbery, where there was a struggle for the possession before the taking was accomplished and the owner of the property was struck in the face there was evidence of robbery. *Parker v. State*, 258 Ark. 880, 529 S.W.2d 860 (1975) (decision under prior law).

Evidence held sufficient to show that defendant employed physical force against the victim. *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980).

Evidence held sufficient to find that the force exerted was sufficient to accomplish its purpose and amounted to robbery. *Turner v. State*, 270 Ark. 969, 606 S.W.2d 762 (1980).

Evidence held sufficient to present a factual question for the jury concerning whether the resistance to apprehension was close enough to the taking to establish robbery. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

As to intent, this section requires that the purpose of employing force must be to commit a theft or to resist apprehension

immediately thereafter. *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994).

Indictment or Information.

For cases discussing the sufficiency of indictments or informations, see *Clary v. State*, 33 Ark. 561 (1878); *Young v. State*, 50 Ark. 501, 8 S.W. 828 (1888); *Boles v. State*, 58 Ark. 35, 22 S.W. 887 (1893); *Keeton v. State*, 70 Ark. 163, 66 S.W. 645 (1902); *Traver v. State*, 72 Ark. 524, 81 S.W. 615 (1904); *Green v. State*, 185 Ark. 1098, 51 S.W.2d 511 (1932); *Nobles v. State*, 189 Ark. 472, 74 S.W.2d 247 (1934); *Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975); *Ferguson v. State*, 257 Ark. 1036, 521 S.W.2d 546 (1975) (preceding decisions under prior law).

On remand of appellant's conviction for committing a hotel robbery, the state was permitted to file an amended information adding the allegation of habitual-offender status; while appellant was awaiting a new trial he was convicted of separate charges in a related case, thus, based on his habitual-offender status, appellant received a sentence of life imprisonment for the aggravated-robbery conviction. *Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003).

Jurisdiction.

Where force was initiated in this state, extension of criminal activity into another state did not deprive courts in this state of jurisdiction to try robbery charge. *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977).

Lesser Included Offenses.

Where the testimony was in conflict as to whether a defendant was armed at the time of the robbery, the court in a prosecution for aggravated robbery should have instructed the jury on the lesser included offense of robbery. *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977).

Robbery is a lesser included offense of aggravated robbery. *Lovelace v. State*, 276 Ark. 463, 637 S.W.2d 548 (1982).

In an aggravated robbery prosecution, refusal to instruct on the lesser included offense of robbery held proper. *Lovelace v. State*, 276 Ark. 463, 637 S.W.2d 548 (1982).

Conspiracy to commit robbery is not a lesser included offense within the definition of aggravated robbery. *Savannah v.*

State, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Even though robbery is a lesser included offense of aggravated robbery, the trial judge was obligated to give the lesser instruction only if there was a rational basis for acquitting defendant of aggravated robbery and convicting him of the lesser offense of robbery. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Where defendant was charged as accomplice in aggravated robbery, trial court erred in failure to give instruction on lesser included offense of robbery held error. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Disorderly conduct, assault, and battery are not lesser included offenses of robbery but are simply offenses of a different class. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Assault is not a lesser included offense of robbery; therefore, the trial court in robbery prosecution correctly refused requested instruction on assault in the first degree. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Theft is not a lesser offense included within robbery. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Battery is not a lesser included offense of robbery. *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

Where the prosecution charged attempted robbery rather than aggravated robbery as the underlying offense to a capital murder charge and defendant was convicted of aggravated robbery, the defendant's conviction must be reduced to simple robbery—the crime which the state used to support the capital murder charge. *Mullins v. State*, 303 Ark. 695, 799 S.W.2d 550 (1990).

Where there was no proof presented that defendant did not have a weapon during the aggravated robbery, it was not error for the trial court to refuse to instruct on the lesser included offenses of robbery and aggravated assault. *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

Where jury was entitled to believe defendant's assertion that she did not know her boyfriend was carrying a gun, while disbelieving her claim that she did not assist in the commission of the robbery, the trial court erred in refusing to give an

instruction on robbery in defendant's trial for aggravated robbery. *Waggle v. State*, 50 Ark. App. 198, 901 S.W.2d 862 (1995).

In defendant's capital murder and aggravated robbery case, a court did not err by failing to instruct the jury on the lesser included offense of robbery where there was no rational basis for such instruction; defendant pushed into the home, demanded money, and pulled out a pair of broken scissors to enforce his demand, and he later murdered the victim and inflicted serious physical harm on another victim. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

Ownership.

A violent taking of property in the presence of others, under claim of title, did not constitute the crime of robbery. *Brown v. State*, 28 Ark. 126 (1873) (decision under prior law).

Ownership of the property taken could be alleged in the information or subsequent bill of particulars either in the real owner or in the person in whose possession the property was at the time taken. *Powell v. State*, 251 Ark. 46, 471 S.W.2d 333 (1971), cert. denied, 406 U.S. 917, 92 S. Ct. 1763, 32 L. Ed. 2d 115 (1972) (decision under prior law).

Physical Force.

Striking a security officer with enough force to knock him to the ground constitutes physical force as defined in this section. *Scott v. State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989).

Testimony by store employees that they ran after and tackled defendant after seeing him take an item from the store without paying for it implied that some type of physical force was used against them, even if one of the employees was the person who used physical force first, and was sufficient to prove the use of physical force element. *Payne v. State*, 86 Ark. App. 59, 159 S.W.3d 804 (2004).

Sentence.

Where there was sufficient evidence to support a conviction of robbery, but insufficient evidence to sustain a conviction of aggravated robbery, the court modified the judgment below by reducing it to the lesser included offense of robbery and imposing the minimum prison sentence prescribed by law for a conviction of robbery.

Fairchild v. State, 269 Ark. 273, 600 S.W.2d 16 (1980).

Sentence of imprisonment and fine held within the range of sentences for a defendant convicted of a Class B felony who had previous felony convictions. *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982).

Theft Distinguished.

Robbery was a compound or aggravated larceny (now theft); it was the stealing from a person with the element of assault, or putting in fear, superadded. *Haley v. State*, 49 Ark. 147, 4 S.W. 746 (1887) (decision under prior law).

Threat of Force.

There is no requirement in this section that the threat of physical harm to an individual be made directly or individually, only that physical force be immediately threatened, however that threat may be communicated. *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994).

Value.

Defendants were properly convicted of robbery even though they abandoned their attempt to rob the store and the only thing of value they obtained was of minimal value. *White v. State*, 226 Ark. 368, 289 S.W.2d 900 (1956) (decision under prior law).

Robbery may occur irrespective of the value of the property obtained or, indeed, whether any transfer of property takes place. *Novak v. State*, 287 Ark. 271, 698 S.W.2d 499 (1985).

Cited: *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979); *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Sutton v. State*, 1 Ark. App. 58, 613 S.W.2d 399 (1981); *Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982); *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982); *Knight v. State*, 277 Ark. 213, 640 S.W.2d 442 (1982); *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982); *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983); *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984); *Walters v. State*, 283 Ark. 243, 675 S.W.2d 364 (1984); *Hickey v. State*, 14 Ark. App. 50, 684 S.W.2d 830 (1985); *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985); *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926

(1985); *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985); *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985); *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986); *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986); *Robinson v. Lockhart*, 823 F.2d 210 (8th Cir. 1987); *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988); *Wilson v. State*, 25 Ark. App. 126, 753 S.W.2d 287 (1988); *United States v. Brittman*, 687 F. Supp. 1329 (E.D. Ark. 1988); *Lilly v. State*, 300 Ark. 53, 776 S.W.2d 347 (1989); *Remeta v. State*, 300 Ark. 92, 777 S.W.2d 833 (1989); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Wilford v. State*, 300 Ark. 185, 777 S.W.2d 855 (1989); *Findley v. State*, 300 Ark. 265, 778 S.W.2d 624 (1989); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420 (1990); *United States v. Brittman*, 750 F. Supp. 388 (E.D. Ark.

1990); *Pomerleau v. State*, 303 Ark. 275, 795 S.W.2d 929 (1990); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Coley v. State*, 304 Ark. 304, 801 S.W.2d 647 (1991); *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991); *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *Houston v. State*, 319 Ark. 498, 892 S.W.2d 274 (1995); *Baldwin v. State*, 48 Ark. App. 181, 892 S.W.2d 534 (1995); *Boyd v. State*, 54 Ark. App. 17, 922 S.W.2d 357 (1996); *Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997); *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997); *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004); *McElyea v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 467 (June 23, 2004).

5-12-103. Aggravated robbery.

(a) A person commits aggravated robbery if he or she commits robbery as defined in § 5-12-102, and the person:

- (1) Is armed with a deadly weapon;
- (2) Represents by word or conduct that he or she is armed with a deadly weapon; or
- (3) Inflicts or attempts to inflict death or serious physical injury upon another person.

(b) Aggravated robbery is a Class Y felony.

History. Acts 1975, No. 280, § 2102; 1979, No. 1118, § 1; 1981, No. 620, § 13; A.S.A. 1947, § 41-2102; Acts 1995, No. 1296, § 2.

Publisher's Notes. Former subsection (c) of this section was held to have

been repealed by the amendment to subsection (b) by Acts 1981, No. 620 in *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987), cert. denied, 485 U.S. 905, 108 S. Ct. 1076, 99 L. Ed. 2d 235 (1988).

RESEARCH REFERENCES

ALR. Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 ALR 5th 657.

Robbery: Identification of victim as person named in indictment or information. 4 A.L.R.6th 577.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L. J. 153.

Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CASE NOTES

ANALYSIS

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Constitutionality.

Although this section contains a mandatory minimum sentence with a provision prohibiting the suspension of execution of sentence, it is not an unconstitutional usurpation of judicial powers; the imposition of sentence is mandatory and the judge is bound to execute the sentence even where the jury recommends partial suspension. *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982).

In General.

Section has redefined robbery so that focus of aggravated robbery has shifted from the taking of property to threat of physical harm to victim; one consequence of definition is that offense is complete when physical force is threatened and no transfer of property need take place. *Birchett v. State*, 294 Ark. 176, 741 S.W.2d 267 (1987).

Accomplice.

The trial court properly submitted the issue of the accomplice status of a witness to the jury where the witness' status as an accomplice was clearly disputed. *Jones v. State*, 15 Ark. App. 283, 695 S.W.2d 386 (1985), supplemental op., reh'g denied, 15 Ark. App. 291, 695 S.W.2d 386 (1985).

Although defendant never actually possessed the gun, he was liable as an accomplice because he assisted and actively participated in the crime. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991).

Although defendant claimed there was no proof of his actual participation or knowledge of the plan to commit the crimes such that accomplice liability should not have attach, the court ruled that, because of his presence when the crimes occurred, along with witness testimony that a man matching his description was in the area shortly after the approximate time of the crimes, the issue was for the jury to consider. *Jefferson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 416 (June 2, 2004).

Double Jeopardy.

The acquittal of a defendant on a charge of willful murder in the course of an armed robbery held to prevent a subsequent trial of the defendant on a charge of armed robbery arising from the same set of facts under the constitutional guarantees against double jeopardy. *Turner v. Arkansas*, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972) (decision under prior law).

Neither robbery nor battery in the first degree is a continuing course of conduct so that defendant, who entered beauty shop, robbed two people and shot one of them, could be convicted of two counts of aggravated robbery and one count of battery in the first degree. *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

The offenses of aggravated robbery and theft of property are separate and distinct and not dependent upon the same evidence to support the convictions; accordingly, defendant's conviction on both charges did not subject him to double jeopardy. *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980).

Where the first impulse setting off a course of conduct, the aggravated robbery, occurred when defendant, armed with a deadly weapon, approached victim with hand outstretched and, when victim refused to willingly turn over her purse, the second impulse, the impulse to use the weapon to overcome her resistance, was instituted, two separate offenses were committed, each commencing at a distinct point in time as the result of a separate impulse, and defendant could be convicted and sentenced for both offenses. *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1764, 68 L. Ed. 2d 242 (1981).

Where a defendant is convicted of both aggravated robbery and first degree battery, the convictions on both counts do not violate the prohibition against double jeopardy since one can commit aggravated robbery merely by committing robbery and being armed with a deadly weapon or representing that one is so armed, while to commit first-degree battery one must actually inflict serious injury. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

The elements of the statutory definitions of first-degree battery and aggravated robbery are different; therefore, convictions for both crimes are valid when

obtained under those subsections. *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983).

Where the same proof was required for each of two counts of aggravated robbery involving the same victim, the entry of conviction on both counts was prohibited. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

The double jeopardy clause and subsection (a) and subdivision (b)(1) of § 5-1-110 did not preclude the defendant's convictions of both attempted first degree murder and aggravated robbery where the defendant held the first victim at gunpoint and examined her jewelry with the purpose of committing a theft, and then he shot the second victim. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

Aggravated robbery is not already an "enhancement provision" applied to robbery and imposed for the use of a deadly weapon, so "enhancement" under § 16-90-121 for the same use of the same deadly weapon does not subject a defendant to "double jeopardy". *Crespo v. State*, 30 Ark. App. 12, 780 S.W.2d 592 (1989).

Elements.

Ownership is not a necessary element of proof for aggravated robbery; the aggravated robbery is complete with the threat of physical harm and the intent to commit theft. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983); *McKinzy v. State*, 313 Ark. 334, 853 S.W.2d 888 (1993); *Lilly v. State*, 300 Ark. 53, 776 S.W.2d 347 (1989); *Wilford v. State*, 300 Ark. 185, 777 S.W.2d 855 (1989).

Defendant's conduct fitted statutory definition of aggravated robbery in that he was in store for the purpose of committing theft and he held a gun on the employees, thereby threatening to employ physical force; the fact that the crime was not successful is of no consequence since nothing need be taken from the victim to sustain an aggravated robbery conviction. *Andrews v. State*, 283 Ark. 297, 675 S.W.2d 636 (1984).

Where the defendant held the victim at gunpoint while he inspected her jewelry, the jury was justified in concluding that the defendant intended to commit theft. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

Whether the defendant took or exercised unauthorized control over the offi-

er's pistol with the purpose of depriving the owner thereof was a question of fact. *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986).

Battery in the first degree is distinguishable from aggravated robbery in that (1) the battery offense requires serious physical injury to another, while aggravated robbery does not, and (2) aggravated robbery requires the purpose of committing robbery while being armed with a deadly weapon, or the representation that one is so armed, while first-degree battery, by statutory definition, requires neither of these two elements. Consequently, defendant can be prosecuted for both offenses. *Robinson v. Lockhart*, 823 F.2d 210 (8th Cir. 1987).

Where the restraint exceeds that which necessarily accompanies the crime of aggravated robbery, the robber is also subject to prosecution for kidnapping. *Frenley v. State*, 291 Ark. 268, 724 S.W.2d 165 (1987).

Aggravated robbery is not a continuing offense. *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

Defendant committed aggravated robbery offense when he entered trailer and announced his intent to rob victims; subsequent actions constituted a separate offense, viz., aggravated assault. *Birchett v. State*, 294 Ark. 176, 741 S.W.2d 267 (1987).

Aggravated robbery and aggravated assault, arising from the same incident, overlap. *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

One can commit aggravated robbery by committing robbery and being armed with a deadly weapon, or by representing that one is armed with a deadly weapon. *Lewis v. State*, 299 Ark. 310, 771 S.W.2d 773 (1989).

The only reasonable inference to be drawn was that defendant intended to take property from the victim where he approached the victim and said, "This is a robbery," appeared to have a pistol in his pocket and had it pointed at her, and when she screamed for help, he ran away. *Fletcher v. State*, 306 Ark. 541, 816 S.W.2d 592 (1991).

Nothing in § 5-12-102 or this section requires that the representation that the offender is armed must be made to the victim of the theft. *Lowe v. State*, 36 Ark. App. 85, 819 S.W.2d 23 (1991).

Robbery does not require that each victim, or even one victim, be deprived of property, but has been redefined by shifting the emphasis from the taking of property to the threat, express or implied, of physical harm to the victim. *Harris v. State*, 308 Ark. 150, 823 S.W.2d 860 (1992).

A person commits aggravated robbery if, with the purpose of committing a theft, he employs or threatens to immediately employ physical force upon another, and he is armed with a deadly weapon. *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992).

One commits aggravated robbery by threatening or using force to take property from others, even if the property did not belong to the victims, and even if the robbery attempt was unsuccessful. *McDaniel v. Norris*, 38 F.3d 385 (8th Cir. 1994), cert. denied, 516 U.S. 826, 116 S. Ct. 92, 133 L. Ed. 2d 48 (1995).

Trial court did not err in admitting testimony about the victim's subsequent death a month after the robbery because the evidence of the victim's death was clearly relevant to prove death or serious physical injury as an element of the offense of aggravated robbery, subdivision (2) of this section. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

Trial court's application of Smith to an aggravated robbery charge and reduction of the conviction to robbery was erroneous because the state did not have to show that the firearm had been used as a firearm, and evidence that clearly showed that defendant employed or threatened to employ physical force while he was armed with a deadly weapon was sufficient for a conviction. *Carter v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Evidence.

Evidence held sufficient to support conviction. *Arnold v. State*, 233 Ark. 3, 342 S.W.2d 291 (1961); *Radcliff v. State*, 249 Ark. 1, 457 S.W.2d 847 (1970) (preceding decisions under prior law); *Warren v. State*, 261 Ark. 173, 547 S.W.2d 392 (1977); *Lunon v. State*, 264 Ark. 188, 569 S.W.2d 663 (1978); *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979); *Duncan v. State*, 267 Ark. 41, 588 S.W.2d 432 (1979); *Ellis v. State*, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979); *Jones v. State*, 269

Ark. 119, 598 S.W.2d 748 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Sanders v. State*, 274 Ark. 525, 626 S.W.2d 366 (1982); *Treats v. State*, 280 Ark. 319, 657 S.W.2d 556 (1983); *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985); *Alfay v. State*, 15 Ark. App. 32, 688 S.W.2d 951 (1985); *Walker v. State*, 287 Ark. 76, 696 S.W.2d 500 (1985); *Johnson v. State*, 287 Ark. 98, 696 S.W.2d 742 (1985); *Treadway v. State*, 287 Ark. 441, 700 S.W.2d 364 (1985); *Robinson v. State*, 291 Ark. 212, 723 S.W.2d 818 (1987); *Jones v. State*, 292 Ark. 183, 729 S.W.2d 10 (1987); *Wilkins v. State*, 292 Ark. 596, 731 S.W.2d 775 (1987); *Robinson v. State*, 293 Ark. 243, 737 S.W.2d 153 (1987); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988); *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988); *Williams v. State*, 295 Ark. 18, 746 S.W.2d 44 (1988); *Lewis v. State*, 295 Ark. 499, 749 S.W.2d 672 (1988); *Wilson v. State*, 25 Ark. App. 126, 753 S.W.2d 287 (1988); *Lilly v. State*, 300 Ark. 53, 776 S.W.2d 347 (1989); *Wilford v. State*, 300 Ark. 185, 777 S.W.2d 855 (1989); *Beebe v. State*, 301 Ark. 430, 784 S.W.2d 765 (1990); *Hamm v. State*, 304 Ark. 214, 800 S.W.2d 711 (1990); *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991); *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991); *Harris v. State*, 308 Ark. 150, 823 S.W.2d 860 (1992); *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992); *Hardrick v. State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994); *Boyd v. State*, 54 Ark. App. 17, 922 S.W.2d 357 (1996); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Box v. State*, 74 Ark. App. 82, 45 S.W.3d 415 (2001).

Evidence held insufficient to prove him guilty of robbery beyond a reasonable doubt. *Green v. State*, 265 Ark. 179, 577 S.W.2d 586 (1979).

Evidence held sufficient to find that there was an immediate threat of death or serious physical injury to the prosecuting witness. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Evidence held sufficient to establish intent to commit a theft. *Johnson v. State*, 276 Ark. 56, 632 S.W.2d 416 (1982).

Evidence held insufficient to support conviction. *Priddgett v. State*, 276 Ark. 52, 631 S.W.2d 833 (1982); *Nichols v. State*, 280 Ark. 173, 655 S.W.2d 450 (1983);

Bishop v. State, 294 Ark. 303, 742 S.W.2d 911 (1988).

Evidence of an implied threat of physical force held sufficient to support conviction. Knight v. State, 277 Ark. 213, 640 S.W.2d 442 (1982).

In prosecution for aggravated robbery, it was prejudicial error to refuse to allow the defendant's mother and grandmother to testify during the guilt-innocence phase of the trial to the effect that under pressure the defendant "goes to pieces," as purposeful intent is an essential element of aggravated robbery. Graham v. State, 290 Ark. 107, 717 S.W.2d 203 (1986).

Defendant's confession was not sufficiently corroborated to prove the crime of aggravated robbery. Trotter v. State, 290 Ark. 269, 719 S.W.2d 268 (1986), overruled on other grounds by Mayfield v. State, 293 Ark. 216, 736 S.W.2d 12 (1987).

Evidence sufficient to support conviction as an accomplice. Campbell v. State, 294 Ark. 639, 746 S.W.2d 37 (1988).

The evidence was sufficient to establish that the threat of a deadly weapon was made immediately after the theft to resist apprehension or arrest, where the theft, flight, struggle, and apprehension were accomplished in a matter of minutes without any significant intervening event. Lowe v. State, 36 Ark. App. 85, 819 S.W.2d 23 (1991).

The instrumentality used to inflict fear is patently relevant to crimes of rape, kidnapping and aggravated robbery, all of which include an element of force for perpetration. Brooks v. State, 308 Ark. 660, 827 S.W.2d 119 (1992).

Knife found at crime site was relevant to corroborate the testimony of the victim concerning stabbings and no prejudice resulted to the defendant from its admission into evidence. Brooks v. State, 308 Ark. 660, 827 S.W.2d 119 (1992).

Display of a gun was sufficient threat to sustain a conviction for aggravated robbery. Robinson v. State, 317 Ark. 17, 875 S.W.2d 837 (1994).

Photo identification, followed by an eyewitness identification at trial, held sufficient. Davis v. State, 318 Ark. 212, 885 S.W.2d 292 (1994).

Even if the trial court had erred in admitting items seized in a motel room, the other evidence of defendant's guilt overwhelming supported the convictions for aggravated robbery and capital mur-

der. Rockett v. State, 318 Ark. 831, 890 S.W.2d 235 (1994).

Although defendant was obliged to abort his robbery of a small store, the evidence of kidnapping, aggravated robbery, and attempted murder held sufficient. Durham v. State, 320 Ark. 689, 899 S.W.2d 470 (1995).

In a capital felony murder case, evidence, though circumstantial, was sufficient to support the jury's conclusion that the victim wore rings and that they were taken by the person who killed her. Martin v. State, 328 Ark. 420, 944 S.W.2d 512 (1997), overruled on other grounds by State v. Bell, 329 Ark. 422, 948 S.W.2d 557 (1997).

Although codefendant gave varying statements about defendant's participation and the victim was unable to identify the defendant, the identification evidence held sufficient in view of the scientific evidence and the testimony of the codefendant. Wilson v. State, 332 Ark. 7, 962 S.W.2d 805 (1988).

Evidence was sufficient to show forcible compulsion where the defendant and his companions abducted the victim at gunpoint and subsequently coerced her to accompany him to various ATMs, to withdraw money, and to give such money to him. Williams v. State, 338 Ark. 97, 991 S.W.2d 565 (1999).

Evidence was sufficient to support a conviction for aggravated robbery where the defendant knew that his associates contemplated a robbery he admitted that he arrived at the rest stop at which the crime occurred armed and loitered for about 30 minutes, he acknowledged that he was in the bathroom in which the crime occurred at the time the victim was shot, and he covered his head, fled with the group, and was later seen with a weapon. Stewart v. State, 338 Ark. 608, 999 S.W.2d 684 (1999).

Evidence, although circumstantial, was sufficient to convict defendant of aggravated robbery because (1) defendant's fingerprint was in the home; (2) defendant matched the victim's description of being a young, light-skinned, black male without facial hair; (3) a neighbor testified that the day before the robbery there was a strange burgundy car, which defendant was driving when he was arrested, parked outside the victim's home; and (4) on the night of the robbery, another neighbor saw

defendant cut through the victim's yard and disappear. *Medlock v. State*, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

Evidence was sufficient to convict defendant of aggravated robbery and theft where the record showed that after the victim was shot, the defendant removed money from the dead man's body, helped to hide the body, hid the dead man's truck, and threw the dead man's wallet and keys away. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

In an armed robbery and theft prosecution, testimony of the driver of the getaway car that directly linked defendant to the robbery, the corroborating testimony of a store employee that defendant took money from, and that of an officer that defendant fled from after the getaway car crashed, was sufficient to convict defendant under § 16-89-111. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004).

Trial court committed reversible error by admitting co-defendant's statement; it was a violation of defendant's Sixth Amendment right to confront witnesses where, even changing defendant's name to a pronoun, it was obvious that the references were indirect or veiled references to him and substantiated his existence and identity relative to the crime. *Jefferson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 416 (June 2, 2004).

Evidence was sufficient to establish that defendant caused the victim's death under circumstances manifesting extreme indifference to the value of human life where defendant (1) admitted pointing a loaded gun at one victim in the course of a robbery, (2) fired a gun at another unarmed victim from less than three feet away, (3) repeatedly threatened to shoot all three victims throughout the ordeal, (4) used a gun to shoot the victim at close range and admitted the shooting was intentional, and (5) not only cursed the victim as he died, but threatened the other victims and locked them in a room so he could get away. *Porter v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 489 (Sept. 16, 2004).

Jury could infer that defendant shot the victim in order to steal drugs and money from the victim, based on defendant's own account of what occurred; thus, there was substantial evidence that defendant shot and killed the victim during the course of, and in furtherance of, an aggravated rob-

bery. *Harper v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 555 (Oct. 7, 2004).

Evidence was sufficient to sustain defendant's aggravated robbery conviction where defendant admitted to being in the vehicle when the crimes occurred, the evidence showed that he was the driver, defendant waited while an accomplice fired shots at the van's driver, and defendant retrieved the bank bag. *Jefferson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 726 (Nov. 18, 2004).

State presented sufficient evidence to prove either robbery or aggravated robbery where the victim testified that defendant and his friends came to the victim's residence and, after duct-taping his mouth and arms, forced him at gunpoint to accompany them to defendant's home where defendant then took \$ 2,040 cash that the victim had on his person; further, the victim maintained at trial that defendant and his friends continually beat him from the time they kidnapped him until they returned him to his home. *Carter v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Victim's eyewitness identification testimony and the officers' identification testimony based on the surveillance tape and a still photograph was sufficient to sustain convictions of aggravated robbery and theft of property; moreover, the victim's testimony that she was fearful and believed defendant was armed, based on his pointing his jacket at her and insinuating that he had a gun, supported the weapon requirement under this section. *Edwards v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 57 (Jan. 27, 2005).

Evidence was sufficient to sustain a conviction for aggravated robbery and to corroborate the accomplice's testimony where witnesses testified as to the role defendant played in the robbery and described his clothing and weapon, which were collected at the scene; further, defendant's jacket had blood stains on it and a hole corresponding to the location of a gunshot wound he received, and defendant was found hiding inside a dumpster near the site where his car became stuck in the mud. *Flowers v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 510 (June 22, 2005).

In an aggravated robbery case, denial of a defendant's motion for directed verdict was proper where, although the victim

was unsure about the identity of defendant as the second man involved in the robbery, there was substantial evidence that defendant participated in the robbery; the victim described two defendants' clothing, the differences between their ages, their being African-American, and the vehicle they fled in, which led the police to taking them into custody. *Wingfield v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 574 (Oct. 6, 2005).

Indictment or Information.

Court did not err in refusing to grant the defendant's motion for a directed verdict on the original allegation of aggravated robbery with a deadly weapon, and then permitting the state to amend the information to include the additional words of the statute that the defendant represented by word or conduct that he was so armed, in order to conform to the proof that the weapon used was in fact a BB pistol. *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982).

Instructions.

Requested instruction that conviction in this state would not prevent defendant from being tried in another state for criminal acts performed within that state was properly refused. *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977).

Instruction that the minimum sentence for aggravated robbery was 10 years imprisonment and not 6 years was correct. *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987), cert. denied, 485 U.S. 905, 108 S. Ct. 1076, 99 L. Ed. 2d 235 (1988).

Where jury was entitled to believe defendant's assertion that she did not know her boyfriend was carrying a gun, while disbelieving her claim that she did not assist in the commission of the robbery, the trial court erred in refusing to give an instruction on robbery in defendant's trial for aggravated robbery. *Waggle v. State*, 50 Ark. App. 198, 901 S.W.2d 862 (1995).

In defendant's trial for aggravated robbery, once the trial court had admonished the jury during the state's closing argument, since defendant made no further objections, did not seek a further admonition, or request a mistrial, his failure to apprise the trial court of his belief that the admonition was inadequate precluded him from raising such an argument on

appeal. *McClain v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 160 (Mar. 10, 2005).

Intent.

In determining whether the defendant committed aggravated robbery, it is of no consequence that the defendant was teaching the victim a lesson or that he did not keep the victim's property for himself. *Smith v. State*, 65 Ark. App. 216, 986 S.W.2d 738 (1999).

Judicial Review.

In determining the sufficiency of the evidence to show aggravated robbery, the Supreme Court only looks to see if, viewed in the light most favorable to the state, there was substantial evidence to support the charge. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980).

Where defendant was convicted of both attempted capital murder, ostensibly the more serious crime, which was a Class A felony, and aggravated robbery, a Class Y felony, the trial court properly set aside the attempted capital murder conviction based on the classification of the crime, rather than whether it was a lesser included offense. *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991).

Jurisdiction.

Where force was initiated in this state, extension of criminal activity into another state did not deprive courts in this state of jurisdiction to try armed robbery charge. *Thomas v. State*, 262 Ark. 79, 553 S.W.2d 32 (1977).

Lesser Included Offense.

Court erred in failing to give instruction on lesser included offense of robbery. *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

In a prosecution for capital murder, in proving the specified felony of aggravated robbery, there must be proof of the same or less than all the elements required to establish the commission of the capital offense and the specified felony is thus an included offense which falls within the double conviction prohibition of § 5-1-110, and the double jeopardy prohibition of the fifth amendment of the United States Constitution. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981).

Aggravated robbery is a lesser included

offense of attempted capital murder. *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982).

Robbery is a lesser included offense of aggravated robbery. *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982); *Lovelace v. State*, 276 Ark. 463, 637 S.W.2d 548 (1982).

Theft is not a lesser offense included within the definition of aggravated robbery. *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982).

Court did not err in refusing to instruct on the lesser included offense of robbery. *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982); *Lovelace v. State*, 276 Ark. 463, 637 S.W.2d 548 (1982); *Smith v. State*, 277 Ark. 403, 642 S.W.2d 299 (1982); *Walters v. State*, 283 Ark. 243, 675 S.W.2d 364 (1984); *Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984).

Where the defendant was convicted and sentenced for both attempted capital murder and aggravated robbery, his conviction and sentence for the lesser included offense of aggravated robbery had to be set aside since aggravated robbery was the underlying specified felony to the charge of attempted capital murder. *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982).

Where the prosecution of defendant for first-degree murder and aggravated robbery arose from the same incident, his convictions for both aggravated robbery and first-degree murder violated the prohibition against double jeopardy and sentence for aggravated robbery would be set aside. *Brewer v. State*, 277 Ark. 40, 639 S.W.2d 54 (1982).

Where the defendant was convicted and sentenced for both aggravated robbery and attempt to commit first-degree murder, but the evidence showed that the aggravated robbery was the underlying felony to the charge of attempted murder, the trial court did not have the authority to impose sentences for both offenses; therefore, the conviction and sentence for the less serious offense, the attempted first-degree murder, would be set aside. *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982).

Where the facts of the case required proof of the aggravated robbery, the underlying felony, in the course of proving battery in the first degree which was alleged to have been committed during the

course of a felony, the greater offense was actually included in the lesser offense and, where defendant was convicted for both offenses, the conviction and sentence for the lesser offense of battery must be set aside. *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983).

Where it was necessary to prove the elements of aggravated robbery and kidnapping to prove the elements of attempted capital murder, the conviction and sentence imposed for aggravated robbery and kidnapping were set aside and the conviction and sentence for attempted capital murder were not disturbed. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983).

Where the defendant committed a first-degree battery during the course of an aggravated robbery, the battery was a lesser included offense of the robbery; thus, where the defendant had been convicted and sentenced for both offenses, the conviction and sentence for first-degree battery would be set aside. *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983).

Where the defendant's convictions for aggravated robbery and first-degree battery grew out of a single act, and the proof required to prove the aggravated robbery necessarily included proof of the first-degree battery, the defendant's conviction and sentence for the lesser offense, the battery, had to be set aside. *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983).

Since the offense of possession of a firearm requires proof that the person possessing the firearm has been convicted of a felony and that fact is not an element in the proof of aggravated robbery, the lesser offense is not included in aggravated robbery. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

Theft, conspiracy to commit theft, conspiracy to commit aggravated robbery, and conspiracy to commit robbery are not lesser included offenses within the definition of aggravated robbery. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

If the evidence showed that defendant aided or advised another in planning or committing a robbery but that the other person committed the greater inclusive offense of aggravated robbery, defendant's liability would be limited to the lesser included offense of robbery. *Savannah v.*

State, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Even though robbery is a lesser included offense of aggravated robbery, the trial judge was obligated to give the lesser instruction only if there was a rational basis for acquitting defendant of aggravated robbery and convicting him of the lesser offense of robbery. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Where the defendant was illegally sentenced by the trial court for both attempted capital murder and the lesser included offense of aggravated robbery, the Arkansas Supreme Court did not err in setting aside his conviction and 10-year sentence for aggravated robbery, but leaving intact his conviction and 30-year sentence for attempted capital murder, since the court was not precluded from imposing sentence under the more stringent provision. *Rowe v. Lockhart*, 736 F.2d 457 (8th Cir. 1984).

The crime of theft is not a lesser included offense of aggravated robbery; thus, the defendant can be sentenced for both of these offenses without violating § 5-1-110, regarding multiple punishments, or the double jeopardy clause of the Fifth Amendment to the U.S. Constitution. *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985).

Aggravated robbery is not a lesser included offense of burglary, as aggravated robbery requires some type of serious force or threat of force used with the purpose of committing a theft, none of which is required to commit burglary, and burglary requires only that the defendant enters or remains unlawfully in an occupiable structure with the purpose of committing any offense punishable by imprisonment. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

First degree battery is a lesser included offense of aggravated robbery. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

Aggravated robbery is not a lesser included offense of attempted capital murder under § 5-10-101(a)(2) (now subdivision (a)(3)). Where aggravated robbery was not the underlying felony of the defendant's attempted capital murder charge, conviction should not be set aside since the attempted capital murder charge was pursuant to § 5-10-101(a)(2)

(now subdivision (a)(3)) and not § 5-10-101(a)(1). *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

Theft and aggravated robbery are separate offenses for which a defendant may be convicted even though they arise out of one incident. *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989).

Where the prosecution charged attempted robbery rather than aggravated robbery as the underlying offense to a capital murder charge and defendant was convicted of aggravated robbery, the defendant's conviction must be reduced to simple robbery — the crime which the state used to support the capital murder charge. *Mullins v. State*, 303 Ark. 695, 799 S.W.2d 550 (1990).

Where there was no proof presented that defendant did not have a weapon during the aggravated robbery, it was not error for the trial court to refuse to instruct on the lesser included offenses of robbery and aggravated assault. *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

In defendant's capital murder and aggravated robbery case, the court did not err by failing to instruct the jury on the lesser included offense of robbery where there was no rational basis for such instruction; defendant pushed into the home, demanded money, and pulled out a pair of broken scissors to enforce his demand, and he later murdered the victim and inflicted serious physical harm on another victim. *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

Representation of Deadly Weapon.

Defendant's hand under his shirt, even with the admitted intention of conveying to the victim that he was armed, was not sufficient representation to satisfy the requirements of aggravated robbery in the absence of the victim's awareness that defendant was armed. *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980).

Although the defendant was charged in the information with aggravated robbery by the actual use of a deadly weapon, it was not error for the trial court to submit to the jury an instruction which allowed them to convict the defendant upon proof that he merely represented that he was so armed. *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985).

Where a defendant verbally represents that he is armed with a deadly weapon this is sufficient to convict for aggravated robbery regardless of whether in fact he did have such a weapon. Where no verbal representation is made and only conduct is in evidence, the focus is on what the victim perceived concerning a deadly weapon. *Clemmons v. State*, 303 Ark. 354, 796 S.W.2d 583 (1990).

Although defendant did not say he had a gun, his statement that he would "shoot" store clerk if she did not give him the money was a verbal representation that he was armed with a deadly weapon and satisfied the requirements of this section. *Coley v. State*, 304 Ark. 304, 801 S.W.2d 647 (1991).

Defendant's use of a pair of scissors and his representation to victim that he had a gun were sufficient to sustain his conviction for aggravated robbery. *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996).

Sentence.

Where the jury convicted both defendants of aggravated robbery and recommended that each be sentenced to three years, the trial judge did not violate the defendants' rights against double jeopardy by sentencing each defendant to five years' imprisonment with two years suspended. *Caldwell v. State*, 268 Ark. 713, 595 S.W.2d 253 (Ct. App. 1980).

Where there was sufficient evidence to support a conviction of robbery, but insufficient evidence to sustain a conviction of aggravated robbery, the court modified the judgment below by reducing it to the lesser included offense of robbery and imposing the minimum prison sentence prescribed by law for a conviction of robbery. *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980).

The relative difference in the severity of sentences given to codefendants in an aggravated robbery trial did not entitle the defendant who received the most severe sentence to a new trial. *Sanders v. State*, 274 Ark. 525, 626 S.W.2d 366 (1982).

Where the defendant's sentence was within the lawful maximum for that offense and was unaffected by any demonstrated error in the trial, the Supreme Court had no authority to modify the sentence. *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982).

Sentence held to be within the legal maximum set by the legislature. *Andrews v. State*, 283 Ark. 297, 675 S.W.2d 636 (1984).

Sentence properly reduced to range prescribed for second-degree murder. *Wilkins v. State*, 292 Ark. 596, 731 S.W.2d 775 (1987).

Due to the amendment of subsection (b) of this section by Acts 1981, No. 620 and the repealing language contained in § 18 of that act, subsection (c) has been repealed. *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987), cert. denied, 485 U.S. 905, 108 S. Ct. 1076, 99 L. Ed. 2d 235 (1988).

Sentence was correctly enhanced. *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

Defendant who was convicted of aggravated robbery and as an habitual offender was properly sentenced to 40 years imprisonment under § 5-4-501(b)(1) since aggravated robbery is a Class Y felony and former subsection (c) of this section, which contained enhancement provisions, was repealed by Acts 1981, No. 620. *Tippitt v. State*, 294 Ark. 342, 742 S.W.2d 931 (1988).

Where merger of two aggravated robberies was not required under § 5-1-110(d)(1), and where defendant waived a sentencing hearing, thereby giving the trial court sole sentencing authority under § 5-4-103(b)(4), the trial court had the authority to order defendant's sentences to run consecutively under § 5-4-403(a). *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003).

Upon conviction for aggravated robbery and misdemeanor theft of property, defendant's enhanced sentence as a habitual offender with two prior felony convictions was affirmed as there was no conflict between § 5-4-104(a) and § 16-90-120(a) and (b); § 5-4-104(a) refers only to the initial sentence and § 16-90-120(a) and (b) refer only to a sentence enhancement that could be added to the initial sentence. *Williams v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 724 (Nov. 17, 2005).

Trial Proceedings.

The defense motion for a mistrial because the trial judge, in identifying the lawyers for the jury panel, mentioned that the defense attorney was from the Public

Defender's Office was properly denied, and the failure to admonish the jury to disregard the reference was not improper where counsel did not request such an admonition. *Vaughn v. State*, 289 Ark. 31, 709 S.W.2d 73 (1986).

Where the fact that the defendant had been in the penitentiary was relevant, because the plan for the robbery was conceived by inmates who were in the penitentiary and a key witness for the state identified the defendant as the man called "Chief" whom he had known in the penitentiary, the prosecutor was entitled to refer to it in his opening statement. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

A request for a reduction from aggravated robbery to simple robbery does not imply a request for a directed verdict for aggravated robbery. *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994).

In defendant's trial for aggravated robbery, his argument, that the trial court erred in allowing a sergeant to testify that cigarettes found in defendant's vehicle during his arrest were those stolen from the liquor store, was not preserved for review because it was only after the last question that defendant's counsel objected, arguing that the sergeant was not qualified to tell the jury what the numbers on the cigarette pack signified; defendant should have objected at the first opportunity to that line of questioning. *McClain v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 160 (Mar. 10, 2005).

Cited: *McGee v. State*, 262 Ark. 473, 557 S.W.2d 885 (1977); *Halfacre v. State*, 265 Ark. 378, 578 S.W.2d 237 (1979); *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979); *McCroskey v. State*, 266 Ark. App. 486, 586 S.W.2d 1 (Ct. App. 1979), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981); *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979); *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980); *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980); *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980); *Smith v. State*, 268 Ark. 282, 595 S.W.2d 671 (1980); *Cromwell v. State*, 269 Ark. 104,

598 S.W.2d 733 (1980); *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980); *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981); *Wilson v. State*, 272 Ark. 361, 614 S.W.2d 663 (1981); *Thorne v. State*, 274 Ark. 102, 622 S.W.2d 178 (1981), cert. denied, 455 U.S. 1024, 102 S. Ct. 1726, 72 L. Ed. 2d 144 (1982); *Lockett v. State*, 275 Ark. 338, 629 S.W.2d 302 (1982); *Brown v. State*, 276 Ark. 20, 631 S.W.2d 829 (1982); *Freeman v. State*, 6 Ark. App. 240, 640 S.W.2d 456 (1982); *Brown v. State*, 278 Ark. 604, 648 S.W.2d 67 (1983); *Pickens v. State*, 279 Ark. 457, 652 S.W.2d 626 (1983); *Moore v. State*, 280 Ark. 222, 656 S.W.2d 698 (1983); *Whitfield v. State*, 8 Ark. App. 329, 652 S.W.2d 42 (1983); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985); *Jones v. State*, 15 Ark. App. 283, 692 S.W.2d 775 (1985); *Forgy v. State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985); *Leggins v. Lockhart*, 649 F. Supp. 894 (E.D. Ark. 1986); *Stickley v. State*, 294 Ark. 44, 740 S.W.2d 616 (1987); *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988); *Noel v. State*, 28 Ark. App. 158, 771 S.W.2d 325 (1989); *Jones v. State*, 301 Ark. 530, 785 S.W.2d 218 (1990); *Johnson v. State*, 307 Ark. 525, 823 S.W.2d 440 (1992); *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993); *Goins v. State*, 319 Ark. 689, 890 S.W.2d 602 (1995); *Garrison v. State*, 319 Ark. 617, 893 S.W.2d 763 (1995); *Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996); *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996); *Carroll v. State*, 326 Ark. 602, 932 S.W.2d 339 (1996); *Mays v. State*, 57 Ark. App. 282, 944 S.W.2d 562 (1997); *Releford v. State*, 59 Ark. App. 136, 954 S.W.2d 295 (1997); *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997); *Marshall v. State*, 68 Ark. App. 223, 5 S.W.3d 496 (1999); *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003); *Hoover v. State*, 353 Ark. 424, 108 S.W.3d 618 (2003); *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

CHAPTER 13

ASSAULT AND BATTERY

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. OFFENSES GENERALLY.
3. TERRORISM.

RESEARCH REFERENCES

ALR. Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females. 5 ALR 4th 708.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 ALR 4th 607.

Cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 ALR 4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR 4th 960.

Human body parts other than feet as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR 4th 1268.

Kicking as assault or assault with a deadly weapon. 19 ALR 5th 823.

Am. Jur. 6 Am. Jur. 2d, Asslt. & B., § 1 et seq.

C.J.S. 6A C.J.S., Asslt. & B., § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-13-201. Battery in the first degree.
- 5-13-202. Battery in the second degree.
- 5-13-203. Battery in the third degree.
- 5-13-204. Aggravated assault.
- 5-13-205. Assault in the first degree.
- 5-13-206. Assault in the second degree.
- 5-13-207. Assault in the third degree.
- 5-13-208. Coercion.

SECTION.

- 5-13-209. Abuse of athletic contest officials.
- 5-13-210. Introduction of controlled substance into body of another person.
- 5-13-211. Aggravated assault upon an employee of a correctional facility.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Enhanced penalties for offenses committed in the presence of a child, § 5-4-701 et seq.

Fines, § 5-4-201.

Hazing, § 6-5-201 et seq.

Term of imprisonment, § 5-4-401.

Testing defendants for human immunodeficiency virus, § 16-82-102.

Unlawful to install or maintain booby traps, § 5-73-126.

RESEARCH REFERENCES

ALR. Criminal liability for injury or death caused by operation of pleasure boat. 8 ALR 4th 886.

Criminal responsibility, generally. 9 ALR 4th 526.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome. 18 ALR 4th 1153.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

The Impact of the 1976 Criminal Code

on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Survey of Arkansas Law: Evidence, 6 UALR L.J. 149.

Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Jurisdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 UALR L.J. 537.

5-13-201. Battery in the first degree.

(a) A person commits battery in the first degree if:

(1) With the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring another person or of destroying, amputating, or permanently disabling a member or organ of that other person's body, the person causes such an injury to any person;

(3) The person causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life;

(4) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice causes serious physical injury to any person under circumstances manifesting extreme indifference to the value of human life; or

(ii) Another person who is resisting the felony or flight causes serious physical injury to any person;

(5) With the purpose of causing serious physical injury to an unborn child or to a woman who is pregnant with an unborn child, the person causes serious physical injury to the unborn child;

(6) The person knowingly causes physical injury to a pregnant woman in the commission of a felony or a Class A misdemeanor, and in so doing, causes serious physical injury to the pregnant woman's unborn child, and the unborn child is subsequently born alive;

(7) The person intentionally or knowingly, without legal justification, causes serious physical injury to a person he or she knows to be twelve (12) years of age or younger; or

(8) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm.

(b) It is an affirmative defense in any prosecution under subdivision (a)(4) of this section in which the defendant was not the only participant that the defendant:

(1) Did not commit the battery or in any way solicit, command, induce, procure, counsel, or aid the battery's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct that could result in serious physical injury.

(c) Battery in the first degree is a Class B felony.

History. Acts 1975, No. 280, § 1601; A.S.A. 1947, § 41-1601; Acts 1987, No. 482, § 1; 1995, No. 360, § 1; 1995, No. 1305, § 1; 2005, No. 1994, § 474.

Amendments. The 2005 amendment inserted "or she" throughout this section;

substituted "that person's" for "his" in (a)(2); deleted former (a)(5); added present (a)(5) and (a)(6); and redesignated former (a)(6) and (a)(7) as present (a)(7) and (a)(8).

RESEARCH REFERENCES

ALR. Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 ALR 5th 657.

Ark. L. Rev. Case Note, Criminal Lia-

bility for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

UALR L.J. Survey — Criminal Law, 10 UALR L.J. 559.

CASE NOTES

ANALYSIS

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Constitutionality.

This section is not unconstitutionally vague or defective. *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977).

In General.

To sustain a conviction for first degree

battery, there must be a severe injury in connection with a wanton or purposeful culpable mental state. *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987), cert. denied, 493 U.S. 896, 110 S. Ct. 247, 107 L. Ed. 2d 197 (1989).

Burden of Proof.

The state must prove as an element of first-degree battery that the defendant acted either purposely or knowingly. *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599, rev'd on other grounds, 276 Ark. 258, 634 S.W.2d 118 (1982).

By the statutory definition of the offense of battery in the first degree under subdivision (a)(4), the State must prove the defendant committed a felony and, in the course of committing that felony, caused serious injury to another person; consequently, proof of the first-degree battery, by statutory definition, must include proof of the underlying felony when the charge is for violating that particular subsection. *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983).

Civil Actions.

Where the defendant's attorney asked the prosecuting witness about a \$1,000,000 civil suit which the prosecuting witness had filed against the defendant arising from the alleged battery, and the attorney implied by one of his questions that, had the defendant paid the prosecuting witness \$18,000, the criminal charges would have been dismissed, the trial court was in error in granting a mistrial. If the cross-examination had been allowed, the jury would have been informed that the prosecuting witness may have been biased due to a financial interest; on the other hand, the jury may have thought that the civil complaint and damages sought were well-founded and that the evidence supported the prosecuting witness's testimony. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986).

Culpable Mental State.

The phrase "under circumstances manifesting extreme indifference to the value of human life" indicates that attendant circumstances must be such as to demonstrate the culpable mental state of the accused and such language provides sufficient notice of the type of conduct proscribed. *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977).

An element of first degree battery is the intent to inflict serious physical injury. *Golden v. State*, 265 Ark. 99, 576 S.W.2d 955 (1979).

To sustain a conviction of first-degree battery, life endangering conduct must generally be involved; there must be a severe injury in conjunction with a wanton or purposeful culpable mental state; and each subsection of this section describes conduct that would produce murder liability if death resulted. *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980).

The defendant was entitled to an instruction requiring the state to prove that he acted either "purposely or knowingly," and he was also entitled to have the jury instructed regarding the definition of "purposely and knowingly." *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599, rev'd on other grounds, 276 Ark. 258, 634 S.W.2d 118 (1982).

The words "under circumstances manifesting extreme indifference to the value of human life" are defined in the nature of

a culpable mental state and therefore are akin to "intent" for the proof of which evidence of other offenses is admissible under § 16-41-101, Rule 404(b). *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982).

While subdivision (a)(3) of this section does not contain or specify the culpable mental state required for its violation, § 5-2-203(b) provides that if the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required, and is established only if a person acts purposely, knowingly, or recklessly; thus, the Criminal Code recognizes three distinct culpable mental states under this section to sustain a conviction for first-degree battery. *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984).

Where defendant was convicted of battery in the first degree for hitting sleeping victim in the head three times with a baseball bat it made little difference that defendant did not take the bat with him to victim's house as he could have formed the requisite intent after he arrived at the house, and purpose to commit a crime can be formed in an instant. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

First-degree battery involves actions which create at least some risk of death and which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

There was substantial evidence that defendant acted with the purpose to cause serious physical injury to the victim under circumstances manifesting extreme indifference to the value of human life where he kicked the victim in the head repeatedly after the victim was down. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

Evidence was sufficient to establish that the defendant acted with the requisite mental state for battery in the first degree where there was testimony that the defendant came at the victim's head like a field-goal kicker approaches a football, and that he was the last one to leave the scene and did so only after delivering several more kicks at the victim's head. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

Evidence was sufficient to establish that the defendant acted under circumstances manifesting extreme indifference

to the value of human life where the defendant, along with five or six other assailants, kicked the victim in the face and head multiple times while the victim was on the ground. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

Deadly Weapon.

A gun is a deadly weapon, even if it has faulty ammunition that could not inflict serious injury. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Because the definition of first degree battery contains the use of a "deadly weapon" as an element of the offense, a court would err in allowing enhancement for such a conviction. *Johnson v. State*, 26 Ark. App. 286, 764 S.W.2d 621 (1989).

Defense or Justification.

Where a conductor, assaulted by a passenger, used force to repel such assault, the burden was on the railroad company to show that the conductor used no more force than appeared to him, as a reasonable man, necessary to repel the assault. *Saint Louis S.W. Ry. v. Berger*, 64 Ark. 613, 44 S.W. 809 (1898) (decision under prior law).

The defendant had to be free from all carelessness in reaching the conclusion that his own safety demanded the action he took against the plaintiff. *Downey v. Duff*, 106 Ark. 4, 152 S.W. 1010 (1912) (decision under prior law).

Court did not err in instructing jury that no one was allowed to exercise right of self defense, if he willingly entered into a fight, where defendant did not request clarification, and made no specific objection to the instruction. *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949) (decision under prior law).

Evidence.

Evidence held sufficient to support conviction. *Henry v. State*, 125 Ark. 237, 188 S.W. 539 (1916); *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949); *Dickson v. State*, 230 Ark. 491, 323 S.W.2d 432 (1959); *Williams v. State*, 257 Ark. 8, 513 S.W.2d 793 (1974) (preceding decisions under prior law); *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987); *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987), cert. denied, 493 U.S. 896, 110 S. Ct. 247, 107 L. Ed. 2d 197 (1989); *Parkman v. State*, 294 Ark. 339, 742 S.W.2d 927 (1988); *Pharo v. State*, 30 Ark.

App. 94, 783 S.W.2d 64 (1990); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

Evidence held insufficient to support conviction. *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980).

Evidence held sufficient to establish the elements of "purpose" and "serious physical injury" under subdivision (a)(1). *Cook v. State*, 2 Ark. App. 278, 621 S.W.2d 224 (1981).

Evidence held sufficient to support the jury's finding that the defendant caused serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life. *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982).

Evidence held sufficient to convict mother of battery in the first degree under subdivision (a)(3) of this section for her abuse of a newborn infant, and for permitting abuse of a child under § 5-27-221. *Reams v. State*, 45 Ark. App. 7, 870 S.W.2d 404 (1994).

Where the victim, a child, was bathed by defendant and received second-degree burns, the physicians at the hospital determined that the child had sustained an intentionally-inflicted immersion injury in which she was forcibly held in position while immersed in scalding water, and the child still bore scars from the incident two years later, there was substantial evidence to show that the victim sustained a serious physical injury as required by § 5-1-102(19), and defendant's conviction for first degree battery under subdivision (a)(6) was proper. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003).

Victim's testimony was sufficient in and of itself to sustain defendant's convictions for aggravated robbery and battery in the first degree because the victim was cross-examined at length by defense counsel regarding the inconsistencies in his testimony but remained adamant that defendant was the person who had come into his house and told him to "break yourself"; in addition, the victim also identified defendant in a photo lineup and identified him again at trial. *Mosley v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 512 (June 30, 2004).

In an assault case arising from shaking a baby under subdivision (a)(4)(A) of this section, testimony of defendant's actions toward the same infant two weeks earlier

was admissible under Ark. R. Evid. 404(b) and 403 because it was offered to show state of mind and to negate the claim of accident. *Smith v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 248 (Mar. 16, 2005).

Firearm.

The clear intent of § 5-13-201(a)(7) is to criminalize and treat as battery in the first-degree any physical injury caused by use of a firearm as a firearm because of the inherent potentially deadly character of the discharge of a firearm, and the subdivision is not intended to include an injury such as clubbing; the plain and ordinary meaning of “by means of a firearm” is that the firearm be used as a firearm. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

Where defendant used a firearm as a club to hit two victims, his conduct did not come within the meaning of subdivision (a)(7); the first-degree battery statute was not intended to include an injury caused by a firearm’s use as a club, but rather to criminalize any injury caused by use of a firearm as a firearm because of the inherent potentially deadly character of the discharge of a firearm. *Washington v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 18 (Jan. 7, 2004).

Instructions.

Failure to give requested instruction defining “circumstances manifesting extreme indifference to the value of human life” held proper. *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599, rev’d on other grounds, 276 Ark. 258, 634 S.W.2d 118 (1982).

The offense of first-degree battery was properly submitted to the jury on instruction since the jury could reasonably find that shooting a person in the mouth creates a substantial risk of death; court’s refusal to submit the lesser included offense of third-degree battery, even if error, was cured by the jury’s choice of first-degree rather than second-degree battery, which was also submitted. *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984).

Where the medical examiner presented a detailed analysis of the injuries sustained by the victims and asserted that they constituted “serious physical injury,” one of the elements of battery in first degree, but doctors called by the defense

disputed the examiner’s findings, insisting that neither victim suffered serious physical injury within the statutory definitions, it would have been reversible error had the trial court refused to give the instruction on the lesser included offenses of second and third-degree battery because evidence was presented tending to disapprove one of the elements of the larger offense. *Hinson v. State*, 18 Ark. App. 14, 709 S.W.2d 106 (1986).

State’s impeachment of defendant with remarks made by defendant’s attorney during opening statement held not an abuse of discretion. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Judicial Review.

On appeal from conviction of first-degree battery, the appellate court reviews the evidence in the light most favorable to the state in determining whether there is substantial evidence to support the verdict of guilty. *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980).

Lesser Included Offenses.

For cases discussing battery as a lesser included offense of robbery, see *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977); *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982); *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983); *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983); *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983); *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983); *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

One defendant was properly charged only with first-degree battery, since there was no basis for a conviction of the lesser degrees of battery, but the second defendant should have been also allowed a jury instruction on second-degree battery, since it could reasonably be found that he had acted recklessly but not purposely. *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978).

The mere fact that the jury convicted the defendant of manslaughter, which required proof of reckless conduct, did not require a conclusion that the jury could not also have found him guilty of first-degree battery, an offense that requires a more culpable mental state, with respect to the survivor of the automobile accident that the defendant caused. *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982).

Because battery in the second degree is a lesser included offense of battery in the first degree, there was no inconsistency in holding one codefendant guilty of being an accomplice to the former offense while holding the other codefendant guilty of the latter offense. *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985).

Where the defendant was armed with a gun and inflicted serious injury on the victim, first degree battery was a lesser included offense of aggravated robbery. *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986), overruled on other grounds by *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987).

The Supreme Court fixed the punishment at the maximum for the crime of first degree battery, where there was insufficient evidence for the crime of aggravated robbery, but sufficient for the lesser offense of first degree battery. *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986), overruled on other grounds by *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987).

First degree battery is a lesser included offense of aggravated robbery. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986).

Battery in the first degree is distinguishable from aggravated robbery in that (1) the battery offense requires serious physical injury to another, while aggravated robbery does not, and (2) aggravated robbery requires the purpose of committing robbery while being armed with a deadly weapon, or the representation that one is so armed, while first-degree battery, by statutory definition, requires neither of these two elements. Consequently, defendant can be prosecuted for both offenses. *Robinson v. Lockhart*, 823 F.2d 210 (8th Cir. 1987).

First-degree battery and aggravated assault are not lesser-included offenses of reckless driving and are not the same offenses for double jeopardy purposes. *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996).

Maiming.

Under former section defining the offense of maiming, it was implied that the act being unlawful in itself was evidence of a malicious intent and it was immaterial by what means or with what instrument the injury was effected or whether

the party was deprived of the use of a limb or member or rendered permanently lame or whether his bodily vigor was merely affected by his strength, activity or the like being decreased. *Baker v. State*, 4 Ark. 56 (1841) (decision under prior law).

Physical Injury.

The evidence failed to show that defendant caused a victim serious physical injury as required by § 5-13-201(a)(1) or § 5-1-102(19) or physical injury by means of a firearm as required by § 5-13-201(a)(7), even though defendant hit the victim with the butt of a pistol, where the injury did not require stitches, and striking a person in such a manner did not constitute injury to another person by means of a firearm under § 5-13-201(a)(7); this injury was covered by § 5-13-202(a)(1). *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

Poison.

There was substantial evidence to support conviction upon finding that poisoning of victim resulted in serious injury, posing a substantial risk of death. *Weaver v. State*, 324 Ark. 290, 920 S.W.2d 491 (1996).

Second-degree Battery.

The phrase "under circumstances manifesting extreme indifference to the value of human life" contained in subdivision (a)(3) of this section is what distinguishes conduct constituting first-degree battery from that of second-degree battery; giving the phrase its plain meaning, the circumstances of first-degree battery must by necessity be more dire and formidable in terms of affecting human life. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

Where defendant held child-victim's hands under hot water for long enough to cause second- and third-degree burns, victim suffered a "serious physical injury," as defined in § 5-1-102(19), but because defendant lacked the mental state required for first-degree battery, defendant was guilty of second-degree battery. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

Cited: *Austin v. State*, 264 Ark. 318, 571 S.W.2d 584 (1978); *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979); *Spratt v. State*, 267 Ark. 687, 590 S.W.2d 65 (Ct. App. 1979); *Mize v. State*, 267 Ark. 743,

590 S.W.2d 75 (Ct. App. 1979); Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1980); Spillers v. State, 268 Ark. 217, 595 S.W.2d 650 (1980); Brown v. State, 278 Ark. 604, 648 S.W.2d 67 (1983); Lum v. State, 281 Ark. 495, 665 S.W.2d 265 (1984); Dudley v. State, 285 Ark. 160, 685 S.W.2d 170 (1985); Collins v. Lockhart, 771 F.2d 1580 (8th Cir. 1985); Wilson v. State, 289 Ark. 141, 712 S.W.2d 654 (1986); Ward v. State, 20 Ark. App. 172, 726 S.W.2d 289 (1987);

Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989); Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990); Hutcherson v. State, 34 Ark. App. 113, 806 S.W.2d 29 (1991); Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991); Nelson v. State, 324 Ark. 404, 921 S.W.2d 593 (1996); Meeks v. State, 55 Ark. App. 220, 936 S.W.2d 555 (1996); Steggall v. State, 340 Ark. 184, 8 S.W.3d 538 (2000); Harmon v. State, 340 Ark. 18, 8 S.W.3d 472 (2000).

5-13-202. Battery in the second degree.

(a) A person commits battery in the second degree if:

(1) With the purpose of causing physical injury to another person, the person causes serious physical injury to any person;

(2) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a deadly weapon other than a firearm;

(3) The person recklessly causes serious physical injury to another person by means of a deadly weapon; or

(4) The person intentionally or knowingly, without legal justification, causes physical injury to a person he or she knows to be:

(A)(i) A law enforcement officer, firefighter, or employee of a correctional facility while the law enforcement officer, firefighter, or employee of a correctional facility is acting in the line of duty.

(ii) As used in this subdivision (a)(4)(A), "employee of a correctional facility" includes a person working under a professional services contract with the Department of Correction, the Department of Community Correction, or the Division of Youth Services of the Department of Health and Human Services;

(B) A teacher or other school employee while acting in the course of employment;

(C) An individual sixty (60) years of age or older or twelve (12) years of age or younger;

(D) An officer or employee of the state while the officer or employee of the state is acting in the performance of his or her lawful duty;

(E) While performing medical treatment or emergency medical services or while in the course of other employment relating to his or her medical training:

(i) A physician;

(ii) A person certified as an emergency medical technician, as defined in § 20-13-202;

(iii) A licensed or certified health care professional; or

(iv) Any other health care provider; or

(F) An individual who is incompetent, as defined in § 5-25-101.

(b) Battery in the second degree is a Class D felony.

History. Acts 1975, No. 280, § 1602; A.S.A. 1947, § 41-1602; Acts 1995, No. 1981, No. 877, § 1; 1983, No. 12, § 1; 1173, § 1; 1995, No. 1305, § 2; 1995, No.

1338, § 1; 1997, No. 207, § 1; 1997, No. 878, § 1; 1999, No. 389, § 1; 2003, No. 66, § 1.

Amendments. The 2003 amendment

added (a)(4)(A)(ii); inserted “or her” in (a)(4)(D); rewrote (a)(4)(E); and made stylistic changes in (a)(4)(A)(i).

RESEARCH REFERENCES

ALR. Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 ALR 5th 657.

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas’ Future, 45 Ark. L. Rev. 505.

UALR L.J. Legislation of the 1983 General Assembly, Juvenile Law, 6 UALR L.J. 631.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Battery, 26 UALR L.J. 365.

CASE NOTES

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Constitutionality.

The provisions of subdivision (a)(4) are of common understanding and practice and thus are not unconstitutionally vague or overbroad. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

In General.

The phrase “under circumstances manifesting extreme indifference to the value of human life” contained in § 5-13-201(a)(3) is what distinguishes conduct constituting first-degree battery from that of second-degree battery; giving the phrase its plain meaning, the circumstances of first-degree battery must by necessity be more dire and formidable in terms of affecting human life. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

Age.

The phrase “twelve years of age or younger,” as used in this section, designates persons whose age is less than or

under twelve years, as well as persons who have reached and passed their twelfth birthday, but have not reached their thirteenth birthday. *State v. Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991), overruled on other grounds, *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992).

This section, requires the State to prove that a defendant have actual knowledge of the victim’s age. *Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001).

Cause.

Where defendant choked victim and said he would kill her, causing victim to jump through the window rather than be shot and killed, the defendant caused the injuries the victim sustained in the fall and was guilty of second-degree battery. *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998).

Course of Conduct.

Conduct upon which the state based charges of manslaughter and second degree battery, a car wreck, was not a single, continuous and uninterrupted act out of which the defendant could only be prosecuted for one offense; neither manslaughter nor second degree battery is specifically defined as a continuing course of conduct. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992).

Defense or Justification.

Where a conductor, assaulted by a passenger, used force to repel such assault, the burden was on the railroad company to show that the conductor used no more force than appeared to him, as a reason-

able man, necessary to repel the assault. *Saint Louis S.W. Ry. v. Berger*, 64 Ark. 613, 44 S.W. 809 (1898) (decision under prior law).

The defendant had to be free from all carelessness in reaching the conclusion that his own safety demanded the action he took against the plaintiff. *Downey v. Duff*, 106 Ark. 4, 152 S.W. 1010 (1912) (decision under prior law).

Court did not err in instructing jury that no one was allowed to exercise right of self defense, if he willingly entered into a fight, where defendant did not request clarification, and made no specific objection to the instruction. *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949) (decision under prior law).

Voluntary intoxication is not a defense to a charge of murder in the first degree or to a charge of battery in the second degree; voluntary intoxication is not available as a defense for purposes of negating specific intent. *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993).

Evidence.

Evidence held sufficient to support conviction. *Henry v. State*, 125 Ark. 237, 188 S.W. 539 (1916); *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949); *Dickson v. State*, 230 Ark. 491, 323 S.W.2d 432 (1959); *Williams v. State*, 257 Ark. 8, 513 S.W.2d 793 (1974) (preceding decisions under prior law); *Lum v. State*, 281 Ark. 495, 665 S.W.2d 265 (1984); *Middleton v. State*, 14 Ark. App. 92, 685 S.W.2d 182 (1985); *Lair v. State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986); *Mann v. State*, 291 Ark. 4, 722 S.W.2d 266 (1987); *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987); *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989); *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

Evidence relating to defendant's activities in moving his car and leaving the scene of an accident held admissible as being relevant to the issue of recklessness of defendant's conduct. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

Evidence held sufficient to sustain the jury's finding of recklessness. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

The jury's finding that an automobile driven by defendant was a deadly weapon was supported by evidence showing how defendant's vehicle left the road and struck a boy in a roadside ditch. *Harmon*

v. State, 260 Ark. 665, 543 S.W.2d 43 (1976).

Testimony held not to support the defendant's conviction for first degree battery; evidence only justified, at most, a conviction of second-degree battery. *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980).

There was substantial evidence from which the fact finder could find that the injuries to the law enforcement officers caused them substantial pain. *Armstrong v. State*, 35 Ark. App. 188, 816 S.W.2d 620 (1991).

Evidence held insufficient to support a finding that the physical force used by the defendant in disciplining her grandchild rose to the degree of second-degree battery. *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997).

Evidence was sufficient to support the conviction of the defendant inmate for second degree battery on a corrections officer where (1) the defendant armed himself with a table leg as he went down a hall in the prison, (2) when he approached a doorway, two officers entered and confronted him, (3) the defendant swung the table leg at one officer and struck him in the face, (4) the officer testified that the blow was very painful, and it was so strong that he almost blacked out, and (5) another officer testified that the defendant swung the table leg like he was trying to smash a watermelon or pumpkin. *Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000).

Instructions.

Where the instruction given properly set forth three sets of acts and circumstances any one of which constituted battery in the second degree and only one of which involved the word recklessly and where there was no showing that the jury necessarily found the appellant guilty under the section of the statute requiring the action to be done recklessly, the failure to instruct on the meaning of the word "recklessly" was not error. *Viar v. State*, 269 Ark. 772, 601 S.W.2d 579 (Ct. App. 1980).

Court held to have properly instructed the jury as to the burden of proof and elements required before the jury could convict for battery in the second degree, and lesser included charges, and refusal of the court to give requested instruction which concerned the state's burden to

prove that defendant knowingly used physical force against a law enforcement officer held proper. *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980).

Where, in prosecution for second-degree battery, there was testimony from which the jury could find that there had been previous problems between the defendant and the officer, that the defendant had in the past been harassed by the officer, that the officer had provoked the altercation by using abusive language to describe the defendant and the defendant's family, and that the defendant struck the officer in self-defense only after the officer had himself pushed and struck the defendant, the evidence was sufficient to raise a question of fact regarding the defense of justification; therefore, the trial court erred in not allowing the defendant's proffered jury instruction on justification. *Lair v. State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986).

In second degree battery prosecution, court erred in refusing to give instruction on lesser included offense of third degree battery where the jury could rationally have found that the defendant "recklessly" caused the injury. *Johnson v. State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989).

Intent.

The only specific intent required by this section is the intent to cause physical injury. *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986).

Evidence held sufficient to indicate defendant's intent to commit physical injury. *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986); *Hundley v. State*, 22 Ark. App. 239, 738 S.W.2d 107 (1987).

The plain wording of subdivision (a)(4)(C) imparts that knowledge on the part of the defendant must be personal to him. The test is whether, from the circumstances in the case at bar, defendant, not some other person or persons, knew that his victim was 60 years of age or older. *Hubbard v. State*, 20 Ark. App. 146, 725 S.W.2d 579 (1987).

Evidence was sufficient to support a conviction under this section where the victim, after he was stabbed by the defendant reported chest pains, difficulty breathing, and faintness. *Hundley v. State*, 22 Ark. App. 239, 738 S.W.2d 107 (1987).

The state presented evidence that the defendant fired a shotgun directly at the

crowd of which the injured victim was a member, and based on this evidence, a jury could certainly conclude that defendant possessed the necessary intent to cause injury as required by the second degree battery statute. *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

Where defendant held child-victim's hands under hot water for long enough to cause second- and third-degree burns, victim suffered a "serious physical injury," as defined in § 5-1-102(19), but because defendant lacked the mental state required for first-degree battery, defendant was guilty of second-degree battery. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994).

Evidence sufficient to find that defendant purposely engaged in conduct that created a substantial danger of death or serious physical injury to victim. *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996).

Evidence was sufficient to show intent where a physician testified that the defendant was able to control his physical actions and could understand options when presented to him. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998).

Law Enforcement Officer.

The appropriate test is whether or not, from the circumstances defendant — and not some other person or persons — knew that his victim was a law enforcement officer. *Gibson v. State*, 316 Ark. 705, 875 S.W.2d 58 (1994).

Lesser Included Offenses.

Court held not obligated to instruct the jury on the lesser included offense of assault. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

Courts failure to instruct jury on lesser included offenses held error as to one defendant, but proper as to the other. *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978).

Because battery in the second degree is a lesser included offense of battery in the first degree, there was no inconsistency in holding one codefendant guilty of being an accomplice to the former offense while holding the other codefendant guilty of the latter offense. *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985).

Battery in the second degree and battery in the third degree require proof that

a deadly weapon was used; in contrast, use of a deadly weapon is not necessary for the commission of manslaughter. Since battery in the second degree and third degree require proof of an element not an element of proof of manslaughter, they are not lesser included offenses of manslaughter. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Physical Injury.

Where victim was hit with a pistol, the trial court did not err when it submitted a charge on second degree battery to the jury since subdivision (a)(2) only requires that a person cause another physical injury by means of a deadly weapon. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

Evidence of injuries to victim held sufficient to support a finding of serious physical injury. *Lum v. State*, 281 Ark. 495, 665 S.W.2d 265 (1984).

The difference between the crime of second-degree battery and the crime of third-degree battery is that third-degree battery concerns "physical injury" rather than "serious physical injury." *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Injuries which involved serious bruising of child would support only the lesser included offense of battery in the third degree and not conviction of second-degree battery. *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Where the jury reasonably could have found that defendant acted purposely, and injury to a person was occasioned by use of a deadly weapon, only "physical injury" need have been shown, and it was not necessary for the state to show "serious physical injury" to obtain a conviction under (a)(2). *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

This section requires "physical injury" if the victim is a law enforcement officer acting in the line of duty. *Armstrong v. State*, 35 Ark. App. 188, 816 S.W.2d 620 (1991).

Where the jury could have reasonably found defendant acted purposely, and where the injury was occasioned by the use of a deadly weapon, only physical injury, not serious physical injury, need have been shown. *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993).

Evidence that victim was hit repeatedly

in the head and face with defendant's fist, was kicked repeatedly, has a permanent scar on her forehead, and remained in the hospital for thirty-six to forty-eight hours, held sufficient to support defendant's conviction for second degree battery. *Black v. State*, 50 Ark. App. 42, 901 S.W.2d 849 (1995).

The physical injury sustained by a police officer while attempting to arrest the defendant was insufficient to support a conviction where the officer testified that he did not even notice his injury until after the defendant had been subdued and other officers called his attention to it. *Allen v. State*, 64 Ark. App. 49, 977 S.W.2d 230 (1998).

Evidence was sufficient to establish that the victim sustained physical injury where he experienced pain from bruises and scrapes on his hands, face, elbows, and knees, and testified that he had a painful bruise on the side of his face from a blow received from the defendant. *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998).

Evidence was sufficient to show that the victim sustained a physical injury, even though he was not hospitalized, where she testified that she was stabbed in the shoulder, back, and arm and that the knife penetrated the muscle in her shoulder area, that she felt faint and "felt this warmth run down my body," that she was scarred as a result of the attack, and that she continued to receive treatment for those scars. *Farrelly v. State*, 70 Ark. App. 158, 15 S.W.3d 699 (2000).

The evidence failed to show that defendant caused a victim serious physical injury as required by § 5-13-201(a)(1) or § 5-1-102(19) or physical injury by means of a firearm as required by § 5-13-201(a)(7), even though defendant hit the victim with the butt of a pistol, where the injury did not require stitches, and striking a person in such a manner did not constitute injury to another person by means of a firearm under § 5-13-201(a)(7); this injury was covered by § 5-13-202(a)(1). *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003).

In determining whether a "physical injury" occurred, the trier of fact may consider the sensitivity of the area of the body to which the injury is inflicted and the severity of the attack; thus, where victim testified that defendant beat him repeat-

edly with a steel pipe, resulting in his face and nose being “busted up” as well as considerable facial bleeding, the trial court did not err in finding that defendant’s purpose was to inflict substantial pain with the pipe. *Stultz v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 560 (Sept. 7, 2005).

Separate Offenses.

Where the evidence displayed defendant’s impulse to kidnap the victim and additional impulses to batter and threaten to kill her when she resisted the kidnapping, convictions for the separate offenses of first-degree terroristic threat-

ening (§ 5-13-301), second-degree battery, and attempted kidnapping (§ 5-3-201) were upheld because defendant’s criminal acts were not all part of the attempted kidnapping and were not a continuing course of conduct. *Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994).

Cited: *Crenshaw v. State*, 271 Ark. 484, 609 S.W.2d 120 (Ct. App. 1980); *Barnes v. State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982); *Van Sickle v. State*, 16 Ark. App. 143, 698 S.W.2d 308 (1985); *Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992); *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001).

5-13-203. Battery in the third degree.

(a) A person commits battery in the third degree if:

(1) With the purpose of causing physical injury to another person, the person causes physical injury to any person;

(2) The person recklessly causes physical injury to another person;

(3) The person negligently causes physical injury to another person by means of a deadly weapon; or

(4) The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to another person by administering to the other person, without the other person’s consent, any drug or other substance.

(b) Battery in the third degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1603; A.S.A. 1947, § 41-1603.

RESEARCH REFERENCES

ALR. Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 ALR 5th 657.

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas’ Future, 45 Ark. L. Rev. 505.

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Defense or Justification.

An officer could not justify an assault on a prisoner on ground that it was committed to suppress disorderly conduct. *Stone v. State*, 56 Ark. 345, 19 S.W. 968 (1892).

Where a conductor, assaulted by a passenger, used force to repel such assault, the burden was on the railroad company to show that the conductor used no more force than appeared to him, as a reasonable man, necessary to repel the assault. *Saint Louis S.W. Ry. v. Berger*, 64 Ark. 613, 44 S.W. 809 (1898) (decision under prior law).

The defendant had to be free from all carelessness in reaching the conclusion that his own safety demanded the action he took against the plaintiff. *Downey v.*

Duff, 106 Ark. 4, 152 S.W. 1010 (1912) (decision under prior law).

Court did not err in instructing jury that no one was allowed to exercise right of self defense, if he willingly entered into a fight, where defendant did not request clarification, and made no specific objection to the instruction. *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949) (decision under prior law).

Evidence.

Circumstantial evidence held sufficient to support the defendants' conviction of third-degree battery. *Vail v. State*, 267 Ark. 1078, 593 S.W.2d 491 (Ct. App. 1980).

Evidence held insufficient to support conviction. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638, review denied, *Kelley v. State*, 7 Ark. App. 230, 646 S.W.2d 703 (1983); *Baumer v. State*, 300 Ark. 160, 777 S.W.2d 847 (1989).

Evidence held sufficient to support conviction. *B.J. v. State*, 56 Ark. App. 35, 937 S.W.2d 675 (1997).

Where the victim, a witness, and an officer testified concerning the incident in which defendant knocked the victim to the floor and then kicked her, the evidence was overwhelming proof that defendant, with the purpose of causing injury to the victim, physically injured the victim; thus, the improper admission of the unavailable officer's testimony was harmless error as to the offense of third-degree battery, subdivisions (a)(1)-(2) of this section. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Where defendant hit the victim and the physical injury was established by medical testimony, the evidence was sufficient to support defendant's conviction for battery in the third degree; defendant's identity was sufficiently established by statements of his accomplice telling him to kill the victim. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Instructions.

Where defendant was charged with second-degree battery in connection with assault on police officer and the court properly instructed the jury as to the burden of proof and elements required before the jury could convict under § 5-13-202, battery in the second degree, and lesser included charges, and where the jury found

the defendant guilty only of battery in the third degree which does not require as an element any offense against a law enforcement officer, there was no error in the refusal of the court to give requested instruction which concerned the state's burden to prove that defendant knowingly used physical force against a law enforcement officer. *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980).

In second degree battery prosecution, court erred in refusing to give instruction on lesser included offense of third degree battery where the jury could rationally have found that the defendant "recklessly" caused the injury. *Johnson v. State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989).

Lesser Included Offenses.

Battery is not a lesser included offense of robbery; third degree battery requires proof of physical injury while robbery calls for the employment of physical force with no physical injury necessary. *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

Battery in the second degree and battery in the third degree require proof that a deadly weapon was used; in contrast, use of a deadly weapon is not necessary for the commission of manslaughter. Since battery in the second degree and third degree require proof of an element not an element of proof of manslaughter, they are not lesser included offenses of manslaughter. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Physical Injury.

Evidence held insufficient to establish that victim's physical condition was impaired or that he was inflicted with substantial pain. *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638, review denied, *Kelley v. State*, 7 Ark. App. 230, 646 S.W.2d 703 (1983).

The difference between the crime of second-degree battery and the crime of third-degree battery is that third-degree battery concerns "physical injury" rather than "serious physical injury." *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Injuries which involved serious bruising of child would support only the lesser included offense of battery in the third degree and not conviction of second-degree battery. *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984).

Where the two-year old victim had bite marks on her buttocks, and pinch marks and apparent fingerprints on her face, and there was testimony by the babysitter that the child appeared to be terrified of the defendant, the jury could reasonably find that the infliction of the bruises was accompanied by the infliction of substantial pain and the victim suffered "physical injury." *Spencer v. State*, 17 Ark. App. 149, 705 S.W.2d 454 (1986).

The fact that the victim was injured but not seriously did not preclude a charge of attempted first degree battery, even though the defendant's conduct also fit the definition of battery in the third degree. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

Cited: *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976); *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977); *Sbabo v. State*, 264 Ark. 497, 572 S.W.2d 585 (1978); *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980); *Viar v. State*, 269 Ark. 772, 601 S.W.2d 579 (Ct. App. 1980); *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980); *Vowell v. State*, 4 Ark. App. 175, 628 S.W.2d 599 (1982); *Holmes v. State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985); *Armstrong v. State*, 35 Ark. App. 188, 816 S.W.2d 620 (1991); *Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993); *Marshall v. State*, 68 Ark. App. 223, 5 S.W.3d 496 (1999).

5-13-204. Aggravated assault.

(a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

- (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person; or
- (2) Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person.

(b) Aggravated assault is a Class D felony.

(c) The provisions of this section do not apply to:

- (1) A law enforcement officer acting within the scope of his or her duty; or
- (2) Any person acting in self-defense or the defense of a third party.

History. Acts 1975, No. 280, § 1604; A.S.A. 1947, § 41-1604; Acts 2003, No. 1113, § 1.

Amendments. The 2003 amendment rewrote (a); and added (c).

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

UALR L.J. Davis, Survey of Arkansas Law: Criminal Law, 2 UALR L.J. 193.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Assault, 26 UALR L.J. 365.

CASE NOTES

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Accomplices.

No accomplice criminal responsibility results from supplying an intoxicant to one allegedly responsible as a principal for violations of subsection (a) of this section, § 5-10-104(a)(1), or § 27-53-101(a)(1). *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

Acts Constituting Assault.

Shooting into a crowd was an assault upon each member of the crowd. *Scott v. State*, 49 Ark. 156, 4 S.W. 750 (1887) (decision under prior law).

Drawing a knife and advancing toward the prosecuting witness constituted an assault, although the prosecuting witness fled and the defendant did not follow. *Wells v. State*, 108 Ark. 312, 157 S.W. 389 (1913) (decision under prior law).

Where defendant drew a cocked shotgun on complainant, there was a presumption that shotgun was loaded. *Ball v. State*, 192 Ark. 858, 95 S.W.2d 632 (1936) (decision under prior law).

If the jury believed, as it could from the evidence, the victim did not engage in conduct that created a substantial danger of death or serious physical injury to the defendant, or that the circumstances did not demonstrate that the victim acted with extreme indifference to the value of human life, then it could not have concluded that he had committed an aggravated assault. *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979).

Evidence held sufficient where defendant made a threatening statement, pointed a pistol at the victims and then cocked the hammer; based on this evidence, the trier of fact could infer from the circumstances that the gun was loaded. *Schwede v. State*, 49 Ark. App. 87, 896 S.W.2d 454 (1995).

Codefendants.

One defendant was not liable for an unexpected assault by his codefendant. *Le Laurin v. Murray*, 75 Ark. 232, 87 S.W. 131 (1905) (decision under prior law).

Defense or Justification.

The person assaulted went to the defendant's house and threatened to kill him and followed him with a gun making violent threats was admissible only in mitigation of the punishment and not as a justification where, at the time the assault was committed, the person assaulted had

laid down his gun and was going away. *Stricklin v. State*, 67 Ark. 349, 56 S.W. 270 (1900) (decision under prior law).

A parent could defend a child against an unlawful assault by the other parent. *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911) (decision under prior law).

The burden was upon the one who committed the assault to show that he was justified. *Robertson v. Sisk*, 115 Ark. 461, 171 S.W. 880 (1914) (decision under prior law).

Double Jeopardy.

Where the prosecutor's reference to the fact that defendant had been drinking was indirect and brief, the state did not use defendant's conduct of operating a motor vehicle in an intoxicated condition to prove the assault charge; therefore, the state did not establish an essential element of the assault offense by proving conduct constituting an offense for which defendant had already been prosecuted and, therefore, defendant was not placed in double jeopardy. *Kaspar v. State*, 41 Ark. App. 158, 852 S.W.2d 141 (1993).

Evidence.

Evidence held sufficient to sustain conviction. *Hogan v. State*, 224 Ark. 191, 272 S.W.2d 312 (1954) (decision under prior law).

Where there was evidence sufficient to demonstrate that the defendant manifested extreme indifference to the value of human life and that he purposely engaged in a course of conduct that created a substantial danger of death or serious physical injury to the victim there was sufficient evidence to support a conviction for aggravated assault. *Vann v. State*, 14 Ark. App. 1, 684 S.W.2d 265 (1985).

In proving that a defendant acted purposely to support a conviction for aggravated assault, it is only necessary to show that the defendant manifested extreme indifference to the value of human life and that he purposely engaged in conduct that created a substantial danger of death or serious injury. It is the conduct that must be undertaken purposefully, not the intended result; so long as the defendant purposely engaged in the required conduct, his intent in doing so does not matter. *Neely v. State*, 18 Ark. App. 122, 711 S.W.2d 482 (1986).

Where there was abundant evidence of

the defendant's guilt of aggravated assault, other testimony was held harmless error. *Jarreau v. State*, 291 Ark. 60, 722 S.W.2d 565 (1987).

Evidence not sufficient to support conviction where defendant, after police officer ordered him to halt, backed up until he was behind a car and pulled a pistol out of his pocket, but where defendant did not point the pistol in the officer's direction or expressly threaten the officer. *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990).

Victim's pretrial and in-court identifications of the defendant were unequivocal and clearly constituted sufficient evidence for the jury to conclude without having to speculate that defendant was the perpetrator. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994).

Evidence held sufficient to support the conviction for criminal use of a prohibited weapon and aggravated assault. *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

The fact that defendant pointed his gun toward two men was enough to sustain his convictions for aggravated assault. *Crowder-Jones v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

Trial court did not err in revoking defendant's probationary sentence based on a fight with another person in a gas station parking lot; defendant committed an aggravated assault under subdivision (a)(1) of this section by running over the victim with a car and there was no basis for reversal due to inconsistencies in the testimony. *Crutchfield v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 524 (June 29, 2005).

—Pointing a Gun.

Assault committed where defendant, after a previous argument with one victim, pointed a gun at that victim and another; although the defendant did not verbally threaten the victims, the fact that a gun is pointed at someone is enough to create a substantial danger of death or serious physical injury to another person. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000).

Evidence was sufficient to support a conviction for aggravated assault where the defendant pointed a gun at another person and a search of her vehicle, shortly

thereafter, found a loaded gun with one round chambered and the safety off. *Dillehay v. State*, 74 Ark. App. 100, 46 S.W.3d 545 (2001).

Because defendant did not point the gun at the officer or expressly threaten the officer, defendant was not guilty of aggravated assault. *Swaim v. State*, 78 Ark. App. 176, 79 S.W.3d 853 (2002).

Instructions.

Where it was sought to convict a peace officer of an aggravated assault by proof that he used more violence in making an arrest than was necessary and the court charged the jury that if defendant used greater force or violence in making the arrest than was apparently necessary, he would not be justified, it was error to refuse a further instruction asked by the defendant to the effect that the defendant had a right to protect himself from serious bodily injury even though it subsequently appeared that he used more force than was actually necessary. *Gillespie v. State*, 69 Ark. 573, 64 S.W. 947 (1901) (decision under prior law).

Where trial court forcefully told jury that it could not convict defendant of assault with intent to kill unless the offense would have been murder had the victim died, contention by defendant that court's instruction placed excessive and unfair emphasis on the crime of murder was without merit. *Doyle v. State*, 253 Ark. 844, 489 S.W.2d 793 (1973) (decision under prior law).

In a prosecution for assault with intent to rape, where the defendant was guilty of an aggravated assault or assault with a deadly weapon, the trial court did not err in refusing instruction on a simple assault. *Frederick v. State*, 258 Ark. 553, 528 S.W.2d 362 (1975) (decision under prior law).

Evidence and the defense offered by defendant required trial court to give lesser included instructions requested by defendant. *Fladung v. State*, 292 Ark. 510, 730 S.W.2d 901 (1987).

Intent.

The principal difference between aggravated assault and assault in the first degree is that one who commits an aggravated assault must act purposely, but one who commits an assault in the first degree need only act recklessly. *Rust v. State*, 263

Ark. 350, 565 S.W.2d 19 (1978); Neely v. State, 18 Ark. App. 122, 711 S.W.2d 482 (1986).

Substantial evidence supported conclusion that defendant acted with necessary indifference to value of human life and purpose to prove aggravated assault. Kendrick v. State, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Lesser Included Offenses.

An assault was included in the charge of robbery. Fox v. State, 50 Ark. 528, 8 S.W. 836 (1888) (decision under prior law).

One could not violate former section dealing with the drawing of deadly weapons without also violating former section defining assault, as the element of assault entered into the higher crime. Sullivan v. State, 131 Ark. 107, 198 S.W. 518 (1917) (decision under prior law).

Aggravated assault held to be a lesser included offense to the charge of criminal attempt to commit capital murder. Moore v. State, 280 Ark. 222, 656 S.W.2d 698 (1983); James v. State, 280 Ark. 359, 658 S.W.2d 382 (1983).

It was permissible for the jury to reject the more serious charge of attempted first degree murder, which would require a finding of a higher degree of culpability than was required of the lesser included offense, and to find the defendant guilty of the lesser offense of aggravated assault. Maples v. State, 16 Ark. App. 175, 698 S.W.2d 807 (1985).

Defendant committed aggravated robbery offense when he entered trailer and announced his intent to rob victims; sub-

sequent actions constituted a separate offense, viz., aggravated assault. Birchett v. State, 294 Ark. 176, 741 S.W.2d 267 (1987).

Aggravated robbery and aggravated assault, arising from the same incident, overlap. Bishop v. State, 294 Ark. 303, 742 S.W.2d 911 (1988).

Aggravated and first degree assault are not lesser included offenses of resisting arrest. Enoch v. State, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

Where there was no proof presented that defendant did not have a weapon during the aggravated robbery, it was not error for the trial court to refuse to instruct on the lesser included offenses of robbery and aggravated assault. Tarkington v. State, 313 Ark. 399, 855 S.W.2d 306 (1993).

First-degree battery and aggravated assault are not lesser-included offenses of reckless driving and are not the same offenses for double jeopardy purposes. Sherman v. State, 326 Ark. 153, 931 S.W.2d 417 (1996).

Cited: Warren v. State, 272 Ark. 231, 613 S.W.2d 97 (1981); Bell v. Lockhart, 741 F.2d 1105 (8th Cir. 1984); Toland v. State, 285 Ark. 415, 688 S.W.2d 718 (1985); Jones v. State, 27 Ark. App. 24, 765 S.W.2d 15 (1989); Parker v. State, 300 Ark. 360, 779 S.W.2d 156 (1989); Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990); Johnson v. State, 307 Ark. 525, 823 S.W.2d 440 (1992); Cooper v. State, 324 Ark. 135, 919 S.W.2d 205 (1996); Guy v. State, 323 Ark. 649, 916 S.W.2d 760 (1996); Sanders v. State, 326 Ark. 415, 932 S.W.2d 315 (1996).

5-13-205. Assault in the first degree.

(a) A person commits assault in the first degree if he or she recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person.

(b) Assault in the first degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1605; A.S.A. 1947, § 41-1605.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS

Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

CASE NOTES

ANALYSIS

Acts constituting assault.
Codefendants.
Defense or justification.
Intent.
Lesser included offenses.
Separate offenses.

Acts Constituting Assault.

Shooting into a crowd was an assault upon each member of the crowd. *Scott v. State*, 49 Ark. 156, 4 S.W. 750 (1887) (decision under prior law).

Drawing a knife and advancing toward the prosecuting witness constituted an assault, although the prosecuting witness fled and the defendant did not follow. *Wells v. State*, 108 Ark. 312, 157 S.W. 389 (1913) (decision under prior law).

Where defendant drew a cocked shotgun on complainant, there was a presumption that shotgun was loaded. *Ball v. State*, 192 Ark. 858, 95 S.W.2d 632 (1936) (decision under prior law).

Codefendants.

One defendant was not liable for an unexpected assault by his codefendant. *Le Laurin v. Murray*, 75 Ark. 232, 87 S.W. 131 (1905) (decision under prior law).

Defense or Justification.

A parent could defend a child against an unlawful assault by the other parent. *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911) (decision under prior law).

The burden was upon the one who committed the assault to show that he was justified. *Robertson v. Sisk*, 115 Ark. 461, 171 S.W. 880 (1914) (decision under prior law).

While §§ 5-2-606 and 5-2-607 stated that the defendant was justified in using force or deadly force only if he reasonably believed that the situation necessitated the defensive force employed, both first-degree and second-degree assault were committed if defendant acted recklessly, under this section and § 5-13-206, and § 5-2-614 provided that justification was not available as a defense to an offense for which recklessness suffices to establish culpability; therefore, defendant was not entitled to self-defense or justification instructions with regard to his charges for first and second-degree assault. *Merritt v.*

State, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Intent.

The principal difference between aggravated assault and assault in the first degree is that one who commits an aggravated assault must act purposely, but one who commits an assault in the first degree need only act recklessly. *Rust v. State*, 263 Ark. 350, 565 S.W.2d 19 (1978); *Neely v. State*, 18 Ark. App. 122, 711 S.W.2d 482 (1986).

Lesser Included Offenses.

An assault was included in the charge of robbery. *Fox v. State*, 50 Ark. 528, 8 S.W. 836 (1888) (decision under prior law).

One could not violate former section dealing with the drawing of deadly weapons without also violating former section defining assault, as the element of assault entered into the higher crime. *Sullivan v. State*, 131 Ark. 107, 198 S.W. 518 (1917) (decision under prior law).

Court held not obligated to instruct the jury on the lesser included offense of assault in defendant's prosecution for second-degree battery. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

Disorderly conduct, assault and battery, are not lesser included offenses of robbery but are simply offenses of a different class. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Evidence and the defense offered by defendant required trial court to give lesser included instructions requested by defendant. *Fladung v. State*, 292 Ark. 510, 730 S.W.2d 901 (1987).

Separate Offenses.

Prosecution in the justice of the peace court for assault and disturbing the public peace could not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Cited: *United States v. Harvey*, 588 F.2d 1201 (8th Cir. 1978); *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981); *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986); *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

5-13-206. Assault in the second degree.

(a) A person commits assault in the second degree if he or she recklessly engages in conduct that creates a substantial risk of physical injury to another person.

(b) Assault in the second degree is a Class B misdemeanor.

History. Acts 1975, No. 280, § 1606;
A.S.A. 1947, § 41-1606.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, And Then They Did...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

Case Note, Criminal Liability for At-

tempting to Inflict the AIDS Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

CASE NOTES

ANALYSIS

Acts constituting assault.

Codefendants.

Defense or justification.

Evidence.

Lesser included offenses.

Separate offenses.

Acts Constituting Assault.

Shooting into a crowd was an assault upon each member of the crowd. *Scott v. State*, 49 Ark. 156, 4 S.W. 750 (1887) (decision under prior law).

Drawing a knife and advancing toward the prosecuting witness constituted an assault, although the prosecuting witness fled and the defendant did not follow. *Wells v. State*, 108 Ark. 312, 157 S.W. 389 (1913) (decision under prior law).

Where defendant drew a cocked shotgun on complainant, there was a presumption that shotgun was loaded. *Ball v. State*, 192 Ark. 858, 95 S.W.2d 632 (1936) (decision under prior law).

There was sufficient evidence to support the conviction for second-degree assault where defendant pushed victim from behind as she went through a door; defendant's actions created a substantial risk that the victim would be physically injured by falling on a concrete sidewalk, and it was of no consequence that victim was able to regain her balance before falling. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997).

Codefendants.

One defendant was not liable for an

unexpected assault by his codefendant. *Le Laurin v. Murray*, 75 Ark. 232, 87 S.W. 131 (1905) (decision under prior law).

Defense or Justification.

A parent could defend a child against an unlawful assault by the other parent. *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911) (decision under prior law).

The burden was upon the one who committed the assault to show that he was justified. *Robertson v. Sisk*, 115 Ark. 461, 171 S.W. 880 (1914) (decision under prior law).

While §§ 5-2-606 and 5-2-607 stated that the defendant was justified in using force or deadly force only if he reasonably believed that the situation necessitated the defensive force employed, both first-degree and second-degree assault were committed if defendant acted recklessly, under § 5-13-205 and this section, and § 5-2-614 provided that justification was not available as a defense to an offense for which recklessness suffices to establish culpability; therefore, defendant was not entitled to self-defense or justification instructions with regard to his charges for first and second-degree assault. *Merritt v. State*, 82 Ark. App. 351, 107 S.W.3d 894 (2003).

Evidence.

Evidence held sufficient to support conviction. *Allen v. State*, 64 Ark. App. 49, 977 S.W.2d 230 (1998).

Lesser Included Offenses.

An assault was included in the charge of

robbery. *Fox v. State*, 50 Ark. 528, 8 S.W. 836 (1888) (decision under prior law).

One could not violate former section dealing with the drawing of deadly weapons without also violating former section defining assault, as the element of assault entered into the higher crime. *Sullivan v. State*, 131 Ark. 107, 198 S.W. 518 (1917) (decision under prior law).

Court held not obligated to instruct the jury on the lesser included offense of assault in defendant's prosecution for second-degree battery. *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

5-13-207. Assault in the third degree.

(a) A person commits assault in the third degree if he or she purposely creates apprehension of imminent physical injury in another person.

(b) Assault in the third degree is a Class C misdemeanor.

History. Acts 1975, No. 280, § 1607; A.S.A. 1947, § 41-1607.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, And Then They Did ...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

CASE NOTES

ANALYSIS

Acts constituting assault.
Codefendants.
Defense or justification.
Evidence.
Lesser included offenses.
Separate offenses.
Time period involved.

Acts Constituting Assault.

Shooting into a crowd was an assault upon each member of the crowd. *Scott v. State*, 49 Ark. 156, 4 S.W. 750 (1887) (decision under prior law).

Drawing a knife and advancing toward the prosecuting witness constituted an assault, although the prosecuting witness fled and the defendant did not follow. *Wells v. State*, 108 Ark. 312, 157 S.W. 389 (1913) (decision under prior law).

Where defendant drew a cocked shotgun on complainant, there was a presumption that shotgun was loaded. *Ball v.*

Separate Offenses.

Prosecution in the justice of the peace court for assault and disturbing the public peace could not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Cited: *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981); *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986).

State, 192 Ark. 858, 95 S.W.2d 632 (1936) (decision under prior law).

Codefendants.

One defendant was not liable for an unexpected assault by his codefendant. *Le Laurin v. Murray*, 75 Ark. 232, 87 S.W. 131 (1905) (decision under prior law).

Defense or Justification.

A parent could defend a child against an unlawful assault by the other parent. *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911) (decision under prior law).

The burden was upon the one who committed the assault to show that he was justified. *Robertson v. Sisk*, 115 Ark. 461, 171 S.W. 880 (1914) (decision under prior law).

Evidence.

There was sufficient evidence to support a conviction where defendant, after police officer ordered him to halt, backed up until he was behind a car, pulled a pistol

out of his pocket, and peered over the top of the car as if to locate the officer's position. *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990).

Defendant could not be convicted of assault in the third degree because there was no evidence that defendant created an apprehension of imminent physical injury in the officer. *Swaim v. State*, 78 Ark. App. 176, 79 S.W.3d 853 (2002).

Lesser Included Offenses.

An assault was included in the charge of robbery. *Fox v. State*, 50 Ark. 528, 8 S.W. 836 (1888) (decision under prior law).

One could not violate former section dealing with the drawing of deadly weapons without also violating former section defining assault, as the element of assault entered into the higher crime. *Sullivan v. State*, 131 Ark. 107, 198 S.W. 518 (1917) (decision under prior law).

Assault in the third degree is a lesser included offense of aggravated assault. *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990).

Separate Offenses.

Prosecution in the justice of the peace court for assault and disturbing the public peace could not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Time Period Involved.

Where defendant pointed rifle at two men grading road on what defendant believed to be his land, then threatened to shoot them when they started to grade again, defendant was properly convicted of terroristic threatening rather than a misdemeanor assault under this section since there is no language in § 5-13-301 to indicate that the terrorizing must occur over a prolonged period of time. *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981).

Cited: *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

5-13-208. Coercion.

(a) A person commits coercion if he or she compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by purposeful conduct designed to instill in the other person a fear that, if a demand is not complied with, the actor or another person will:

- (1) Cause physical injury to any person;
- (2) Cause damage to property;
- (3) Subject any person to physical confinement;
- (4) Accuse any person of an offense or cause criminal proceedings to be instituted against any person; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule.

(b) Coercion is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1609; A.S.A. 1947, § 41-1609.

5-13-209. Abuse of athletic contest officials.

With the purpose of causing physical injury to another person, any person who strikes or otherwise physically abuses an athletic contest official immediately prior to, during, or immediately following an interscholastic, intercollegiate, or any other organized amateur or

professional athletic contest in which the athletic contest official is participating is guilty of a Class A misdemeanor.

History. Acts 1987, No. 355, § 1.

5-13-210. Introduction of controlled substance into body of another person.

(a) It is unlawful for any person to inject any controlled substance as defined by the Uniform Controlled Substances Act, § 5-64-101 et seq., into the human body of another person, unless the controlled substance has been ordered for the person receiving the controlled substance by a licensed practitioner, licensed by the state to prescribe controlled substances in the schedule involved and this being for a legitimate medical purpose.

(b) It is unlawful for any person to administer or cause to be ingested, inhaled, or otherwise introduced into the human body of another person a controlled substance as defined by the Uniform Controlled Substances Act, § 5-64-101 et seq., unless the controlled substance has been ordered for the person receiving the controlled substance by a licensed practitioner, licensed by the state to prescribe controlled substances in the schedule involved and this being for a legitimate medical purpose.

(c) Any person who violates this section with respect to:

(1) A controlled substance in Schedule I or Schedule II, which is a narcotic drug, is guilty of a Class Y felony;

(2) Any other controlled substance in Schedule I, Schedule II, or Schedule III is guilty of a Class B felony; or

(3) Any other controlled substance in Schedule IV, Schedule V, or Schedule VI is guilty of a Class C felony.

(d) The provisions of this section and any criminal penalty provided for in this section are in addition to any other criminal penalty a person may be subjected to under a provision of the Arkansas Criminal Code or the Uniform Controlled Substances Act, § 5-64-101 et seq.

(e) It is not a defense under a provision of this section that a person:

(1) Consented to being injected with the controlled substance; or

(2) Ingested, inhaled, or otherwise introduced the controlled substance into his or her human body knowingly and voluntarily.

(f) Notwithstanding a provision of subsection (c) of this section, any person is guilty of a Class Y felony who violates this section by introducing a controlled substance into the body of another person without that other person's knowledge or consent with the purpose of:

(1) Committing any felony sexual offense, as defined in Arkansas law;

(2) Engaging in any unlawful sexual act, as defined in § 5-14-101 et seq.;

(3) Engaging in any unlawful sexual contact, as defined in § 5-14-101; or

(4) Engaging in any act involving a child engaging in sexual explicit conduct, as defined in § 5-27-302.

History. Acts 1987, No. 848, §§ 1-3; 1999, No. 516, § 1.

Publisher's Notes. Schedules I through VI referred to in this section are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or

her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

Meaning of "Arkansas Criminal Code". See note to § 5-1-101.

5-13-211. Aggravated assault upon an employee of a correctional facility.

(a) A person commits aggravated assault upon an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to an employee of any state or local correctional facility while the employee of the state or local correctional facility is engaged in the course of his or her employment by causing the employee of the state or local correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by throwing, tossing, or expelling the fluid or material.

(b) Aggravated assault upon an employee of a correctional facility is a Class D felony.

History. Acts 1997, No. 1235, § 1; 2003, No. 1271, § 1.

Amendments. The 2003 amendment, in (a), substituted "to the personal hygiene of the employee" for "to the value of

human life" and "danger of infection" for "danger of death or serious physical injury," added "by throwing ... or material" to the end, and made stylistic and gender neutral changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Assault, 26 UALR L.J. 365.

SUBCHAPTER 3 — TERRORISM

SECTION.

5-13-301. Terroristic threatening.

5-13-302 — 5-13-309. [Reserved.]

SECTION.

5-13-310. Terroristic act.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Terrorism, § 5-54-201 et seq.

Effective Dates. Acts 1979, No. 428, § 3: Mar. 20, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that there has

been an outbreak of sniping incidents along highways in central Arkansas in recent weeks; that such sniping is a serious danger to persons using the highways; that the criminal penalties for such acts should be increased immediately to discourage further sniping incidents. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public

peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1993, Nos. 379 and 388, § 10: Mar. 8, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 544, § 5: Mar. 16, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that the definition of “terroristic act” does not include shootings into occupiable structures

which have become prevalent in addition to shootings into automobiles which is covered in the definition. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1995, No. 1302, § 8: Apr. 14, 1995. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

ALR. Validity and construction of terroristic threat statutes. 45 ALR 4th 949.

5-13-301. Terroristic threatening.

(a)(1) A person commits the offense of terroristic threatening in the first degree if:

(A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person; or

(B) With the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.

(2) Terroristic threatening in the first degree is a Class D felony.

(b)(1) A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to another person.

(2) Terroristic threatening in the second degree is a Class A misdemeanor.

(c)(1)(A) Upon pretrial release of the defendant, a judicial officer shall:

(i) Enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure; and

(ii) Give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order under subdivision (c)(1)(A) of this section remains in effect during the pendency of any appeal of a conviction under this section.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order under subdivision (c)(1)(A) of this section to the victim and arresting agency without unnecessary delay.

(2) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

History. Acts 1975, No. 280, § 1608; 1979, No. 753, § 1; A.S.A. 1947, § 41-1608; Acts 1993, No. 379, § 4; 1993, No. 388, § 4; 1993, No. 1189, § 3; 1995, No. 1302, § 2.

Publisher's Notes. Acts 1993, No. 1189, § 1, provided: "(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age

juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is increasing.

"(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees."

Cross References. Harassment, § 5-71-208.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, And Then They Did ...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

UALR L.J. Notes, Constitutional Law

— The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Jurisdiction. Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 UALR L.J. 537.

CASE NOTES

ANALYSIS

Constitutionality.

Communication of threat.

Defenses.

Evidence.

— Insufficient.

Fright.

Length of threat.

Separate offenses.

Sufficient threats.

Constitutionality.

The mere overlapping of the provisions of this section and the assault statutes does not render this section unconstitutional. Warren v. State, 272 Ark. 231, 613 S.W.2d 97 (1981).

Communication of Threat.

There is no language in the statute indicating the threat must be communi-

cated by the accused directly to the person threatened to constitute a violation. Richards v. State, 266 Ark. 733, 585 S.W.2d 375 (Ct. App. 1979).

The conduct prohibited by this section is the communication of threat with the purpose of terrorizing another. It is not necessary that the recipient of the threat actually be terrorized. Smith v. State, 296 Ark. 451, 757 S.W.2d 554 (1988).

It would defy common sense to maintain that threatening to punch a woman hard enough to kill her unborn child does not carry with it a threat to cause serious physical injury to the woman personally. Hagen v. State, 47 Ark. App. 137, 886 S.W.2d 889 (1994).

Defenses.

The fact that a threat is conditioned in such a way as is calculated to coerce another person to abstain from a course of

action he has a legal right to pursue is not a valid defense. *Richards v. State*, 266 Ark. 733, 585 S.W.2d 375 (Ct. App. 1979).

Because terroristic threatening requires a purposeful mental state, the defense of voluntary intoxication is available to a defendant charged with such crime. *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

The defendant in a prosecution for terroristic threatening was required to show that he was incapacitated by drinking alcohol — not merely that he drank alcohol — to obtain an instruction on voluntary intoxication as a defense. *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

Evidence.

Evidence held sufficient to support the conviction. *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984); *Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000).

Evidence was sufficient to support a conviction where the victim, who was the defendant's stepdaughter, testified that the defendant raped her and told her not to tell anyone or he would beat her. *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000).

Where the victim testified that defendant threatened to kill her, a witness corroborated the victim's testimony, and defendant's threats had been reported to officers, the erroneous admission of the unavailable officer's testimony was harmless as to the offense of first-degree terroristic threatening, subdivision (a)(1)(A) of this section. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Evidence was sufficient to convict defendant of terroristic threatening where the jury could infer from the circumstances that defendant's intent was to terrorize his ex-wife; it was not necessary that the ex-wife actually be frightened by defendant's threat as the proscribed conduct was defendant's intent to cause her fright. *Crowder-Jones v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

Evidence presented supported a conviction of first-degree terroristic threatening where defendant threatened to kill both the kidnapping victim and his girlfriend and to blow up their house if the victim did not later return to defendant's home with more money. *Carter v. State*, — Ark.

—, — S.W.3d —, 2005 Ark. LEXIS 26 (Jan. 13, 2005).

Evidence that the victim was in a fight, was being forced out of the house, was threatened with death, and pleaded for her life constituted substantial evidence in support of defendant's conviction for first-degree terroristic threatening because there was substantial evidence that the necessary threat was made, as well as an intent that the victim be terrorized by the threat. *Mason v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 235 (Apr. 14, 2005).

—Insufficient.

Evidence was insufficient to sustain defendant's juvenile adjudication for terroristic threatening in the first degree; the appellate court found that a hit list found by a teacher in defendant's school notebook was not sufficient to find that he had the "purpose of terrorizing another." *Roberts v. State*, 78 Ark. App. 103, 78 S.W.3d 743 (2002).

Fright.

Under this section, it is an element of the offense that the defendant act with the purpose of terrorizing another person, i.e., it must be his "conscious object" to cause fright. *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988).

To be found guilty of threatening, the defendant must intend to fill the victim with intense fright. *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988).

Length of Threat.

There is no language in this section which requires terrorizing over a prolonged period of time. *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981); *Davis v. State*, 12 Ark. App. 79, 670 S.W.2d 472 (1984).

Separate Offenses.

Where the evidence displayed defendant's impulse to kidnap the victim and additional impulses to batter and threaten to kill her when she resisted the kidnapping, convictions for the separate offenses of first-degree terroristic threatening, second-degree battery (§ 5-13-202), and attempted kidnapping (§ 5-3-201) were upheld because defendant's criminal acts were not all part of the attempted kidnapping and were not a continuing course of conduct. *Hagen v.*

State, 318 Ark. 139, 883 S.W.2d 832 (1994).

Sufficient Threats.

The threat to shoot another is a threat to cause such serious physical injury to another person as to constitute terroristic threatening. *Richards v. State*, 266 Ark. 733, 585 S.W.2d 375 (Ct. App. 1979).

This section criminalizes not only present threats, but future threats as well. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

Testimony of witnesses to defendant's statements that "he'd kill everyone in the building" was sufficient to sustain his conviction of terroristic threatening. A jury could easily conclude that he meant anyone or all. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

This section does not require that it be shown that the accused has the immediate ability to carry out the threats. *Knight*

v. State, 25 Ark. App. 353, 758 S.W.2d 12 (1988).

Evidence was sufficient to sustain defendant's stalking conviction where there was evidence of terroristic threats to "burn" the victim, along with numerous incidents of harassment, vandalism, and other hostile acts directed toward the victim and her family. *Lowry v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 279 (Mar. 23, 2005).

Cited: *Wade v. Tomlinson*, 284 Ark. 432, 682 S.W.2d 751 (1985); *United States v. Rapert*, 813 F.2d 182 (8th Cir. 1987); *Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989); *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990); *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993); *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995); *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996); *Jones v. State*, 347 Ark. 409, 64 S.W.3d 728 (2002); *Lowry v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 625 (Oct. 20, 2005).

5-13-302 — 5-13-309. [Reserved.]

5-13-310. Terroristic act.

(a) For the purposes of this section, a person commits a terroristic act if, while not in the commission of a lawful act, the person:

(1) Shoots at or in any manner projects an object with the purpose to cause:

(A) Injury to another person; or

(B) Damage to property at a conveyance that is being operated or that is occupied by another person; or

(2) Shoots with the purpose to cause injury to a person or damage to property at an occupiable structure.

(b)(1) Any person who commits a terroristic act as defined in subsection (a) of this section is deemed guilty of a Class B felony.

(2) Any person who commits a terroristic act as defined in subsection (a) of this section is deemed guilty of a Class Y felony if the person with the purpose of causing physical injury to another person causes serious physical injury or death to any person.

(c) This section does not repeal any law or part of a law in conflict with this section, but is supplemental to the law or part of a law in conflict.

History. Acts 1975, No. 312, §§ 1-3; 1979, No. 428, § 1; A.S.A. 1947, §§ 41-1651, 41-1652, 41-1652n; Acts 1993, No. 544, § 1; 2005, No. 197, § 1.

Amendments. The 2005 amendment, in (a)(1) and (a)(2), inserted "or she" and

"damage to" and made minor punctuation changes; inserted "another person or other" in (a)(1)(A); substituted "another person or other persons" for "passengers" in (a)(1)(B); and inserted "a person or" in (a)(2).

CASE NOTES

ANALYSIS

Construction.

Multiple offenses.

Sufficiency of evidence.

Construction.

The phrase “while not in the commission of a lawful act” in subsection (a) was clearly intended to provide a defense to those persons who may have been legally justified in committing the proscribed acts, with the most obvious examples being a person acting in self-defense and a police officer returning the gunfire of a criminal suspect. *Jackson v. State*, 336 Ark. 530, 986 S.W.2d 405 (1999).

Trial court did not err in sentencing defendant, who was convicted of two counts of committing a terroristic act, to 30 years’ imprisonment pursuant to the “three strikes” provision of § 5-4-501(d)(1) based on the fact that he had been convicted the previous month of three counts of aggravated robbery in an unrelated case. *Benson v. State*, 86 Ark. App. 154, 164 S.W.3d 495 (2004).

Multiple Offenses.

The crime defined by the statute is not a continuous course of conduct crime; thus where the defendant fired three quick, successive shots into his girlfriend’s apartment, he was properly convicted of three separate terroristic acts. *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999).

Since committing a terroristic act was not a continuous-course-of-conduct crime,

in that each shot fired was punishable as a separate act, where defendant fired multiple shots at the victim, his conviction of both committing a terroristic act and of battery was not barred by double jeopardy. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001).

Sufficiency of Evidence.

Defendant’s conviction for two counts of a terroristic act was proper where the state presented evidence that, five hours before the offenses occurred, defendant and the victim got into a fight and defendant stated that he was going to “get” the victim; the state also presented evidence that, shortly after the fight, defendant stated that he intended to kill the victim. *Johnson v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 715 (Sept. 24, 2003).

Defendant’s convictions for first-degree murder, a terroristic act, and possession of firearms by certain persons were proper where the jury believed the witnesses’s testimony that defendant fired the only shots and fired toward the group where the victim was standing and toward the nightclub. *Jackson v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 557 (Sept. 29, 2005).

Cited: *Webb v. State*, 48 Ark. App. 216, 893 S.W.2d 357 (1995); *Guy v. State*, 323 Ark. 649, 916 S.W.2d 760 (1996); *Watson v. State*, 329 Ark. 511, 951 S.W.2d 304 (1997); *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998); *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998).

CHAPTER 14

SEXUAL OFFENSES

SUBCHAPTER.

1. GENERAL PROVISIONS.

2. MEDICAL RECORDS OF PERSONS CHARGED WITH SEX CRIMES.

A.C.R.C. Notes. References to “this chapter” in §§ 5-14-101 — 5-14-127 and 5-14-129 may not apply to § 5-14-128 which was enacted subsequently.

Publisher’s Notes. For Comments re-

garding the Criminal Code, see Commentaries Volume B.

Cross References. Emergency medical/legal examinations for sexual assault victims, § 12-12-401 et seq.

Katie's Law, § 16-88-115.
Fines, § 5-4-201.

Minor sexual assault victims, presence of parent or custodian at all proceedings, § 16-42-102.

Obscenity, § 5-68-201 et seq.

Prostitution, § 5-70-101 et seq.

Term of imprisonment, § 5-4-401.

Testing for human immunodeficiency virus for persons arrested and charged with certain sexual offenses, § 16-82-101.

Use of children in sexual performances, § 5-27-401 et seq.

Sexual offenses screened in criminal background checks, § 25-1-112.

Effective Dates. Acts 1985, No. 281, § 6: Mar. 17, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 326, § 3: Mar. 12, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 327, § 3: Mar. 12, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full

force and effect from and after its passage and approval."

Acts 1985, No. 563, § 2: Mar. 25, 1985. Emergency clause provided: "Because the Arkansas Supreme Court, in the case of *Kramer v. State*, 283 Ark. 36 (1984), has declared that the touching of the buttocks is not prohibited conduct as defined in Arkansas Statute 41-1801(8), there presently exists a loophole that allows a person to fondle another and escape prosecution under Chapter 18 of the Arkansas Criminal Code; that this is contrary to legislative intent and needs immediate rectification. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 870, § 6: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that sexual crimes against children have risen in alarming numbers in recent years and the current laws in this State inadequately protect potential child victims of sex crimes and are not harsh enough to serve as a deterrent to potential child abusers. Therefore, this Act is necessary to immediately correct a currently severe problem in this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 919, § 6: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 614, § 8: Mar. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that a person with Acquired Immunodeficiency Syndrome (AIDS) or Hu-

man Immunodeficiency Virus (HIV) antigen or antibodies who acts irresponsibly with respect to sexual contact or with respect to transfer of blood or blood products constitutes a deadly threat to the public and health and welfare of the people of the state of Arkansas; that the incidence of Acquired Immunodeficiency Syndrome (AIDS) is increasing at an alarming rate and that Acquired Immunodeficiency Syndrome (AIDS) results in enormous social, health and economic costs, ultimately causing premature death of all those infected with Human Immunodeficiency Virus (HIV). Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 831, § 6: Mar. 26, 1997.

Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that those persons who are institutionalized in hospitals and human development centers and who are incapable of consent are not adequately protected by current rape and sexual abuse statutes. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. "Rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR 4th 283.

Admissibility of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR 4th 330.

Defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 ALR 4th 1009.

Entrapment defense in sex offense prosecutions. 12 ALR 4th 413.

Sodomy generally. 20 ALR 4th 1009.

Validity of statute making sodomy a criminal offense. 20 ALR 4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 ALR 4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR 4th 1213.

Necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR 4th 120.

Admissibility of expert testimony on rape trauma syndrome. 42 ALR 4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation. 42 ALR 4th 937.

Mental examinations to determine competency or credibility of complainant in sexual offense prosecution. 45 ALR 4th 310.

Am. Jur. 50 Am. Jur. 2d, Lewdness, §§ 17, 18.

65 Am. Jur. 2d, Rape, § 1 et seq.

70C Am. Jur. 2d, Sodomy, § 1 et seq.

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

Killenbeck, And Then They Did ... ? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

Note, Arkansas Rules of Evidence in Child Sexual Abuse: Vann v. State, 47 Ark. L. Rev. 239.

C.J.S. 53 C.J.S., Lewdness, § 1 et seq.

75 C.J.S., Rape, § 1 et seq.

81A C.J.S., Sodomy, § 1 et seq.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Legislative Survey, Criminal Law, 8 UALR L.J. 559.

CASE NOTES

Sentencing.

Sentencing shall not be other than in accordance with the statute in effect at

the time of the commission of the crime. *Meadows v. State*, 320 Ark. 686, 899 S.W.2d 72 (1995).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-14-101. Definitions.
- 5-14-102. In general.
- 5-14-103. Rape.
- 5-14-104. [Repealed.]
- 5-14-105. [Repealed.]
- 5-14-106. [Repealed.]
- 5-14-107. [Repealed.]
- 5-14-108. [Repealed.]
- 5-14-109. [Repealed.]
- 5-14-110. Sexual indecency with a child.
- 5-14-111. Public sexual indecency.
- 5-14-112. Indecent exposure.
- 5-14-113 — 5-14-119. [Reserved.]
- 5-14-120. [Repealed.]
- 5-14-121. [Repealed.]
- 5-14-122. Bestiality.

SECTION.

- 5-14-123. Exposing another person to human immunodeficiency virus.
- 5-14-124. Sexual assault in the first degree.
- 5-14-125. Sexual assault in the second degree.
- 5-14-126. Sexual assault in the third degree.
- 5-14-127. Sexual assault in the fourth degree.
- 5-14-128. Registered offender living near school or daycare prohibited.
- 5-14-129. Registered offender working with children prohibited.

5-14-101. Definitions.

As used in this chapter:

(1) “Deviate sexual activity” means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2) “Forcible compulsion” means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;

(3) “Guardian” means a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor;

(4)(A) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person:

(i) Incapable of understanding the nature and consequences of a sexual act; or

(ii) Unaware a sexual act is occurring.

(B) A determination that a person is mentally defective shall not be based solely on the person’s intelligence quotient;

(5) “Mentally incapacitated” means that a person is temporarily incapable of appreciating or controlling the person’s conduct as a result of the influence of a controlled or intoxicating substance:

- (A) Administered to the person without the person’s consent; or
- (B) That renders the person unaware a sexual act is occurring;

(6) “Physically helpless” means that a person is:

- (A) Unconscious;
- (B) Physically unable to communicate a lack of consent; or
- (C) Rendered unaware a sexual act is occurring;

(7) “Public place” means a publicly or privately owned place to which the public or a substantial number of people have access;

(8) “Public view” means observable or likely to be observed by a person in a public place;

(9) “Sexual contact” means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and

(10) “Sexual intercourse” means penetration, however slight, of the labia majora by a penis.

History. Acts 1975, No. 280, § 1801; 1985, No. 327, § 1; 1985, No. 563, § 1; A.S.A. 1947, § 41-1801; Acts 1995, No. 525, § 1; 2001, No. 1724, § 1.

Amendments. The 2001 amendment added “or renders the person unaware the

sexual act is occurring” in present (4)(A) and (B); added “or is rendered unaware the sexual act is occurring” in (5); and made stylistic and gender neutral changes throughout.

RESEARCH REFERENCES

ALR. What constitutes “public place” within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 ALR 5th 229.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Deviate sexual activity.
Endangerment offense.
Forcible compulsion.
Penetration.
Physically helpless.
Public place.
Sexual contact.
Sexual gratification.
Sexual intercourse.

Deviate Sexual Activity.

Where the defendant put the child’s penis in his mouth, the defendant could properly be tried and convicted for deviate sexual activity, despite the defendant’s contention that the criminal statutes as

written did not include his actions, in that only the body of the accused was penetrated, and not the body of the victim. *Hoggard v. State*, 277 Ark. 117, 640 S.W.2d 102 (1982), cert. denied, 460 U.S. 1022, 103 S. Ct. 1273, 75 L. Ed. 2d 495 (1983).

Evidence held insufficient to sustain the charge of rape by deviate sexual activity. *Peebles v. State*, 305 Ark. 338, 808 S.W.2d 331 (1991).

Evidence of sexual contact was sufficient to show the commission of rape by deviate sexual activity. *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

It is not necessary for the state to provide direct proof that an act is done for sexual gratification if it can be assumed

that the desire for sexual gratification is a plausible reason for the act, or when persons, other than physicians or other persons for legitimate medical reasons, insert something in another person's vagina or anus. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

An 11-year-old boy's testimony that defendant touched his penis inside his underwear and hugged him, asked him to perform oral sex, and the boy's description in graphic detail how defendant performed oral sex on him on at least two separate occasions was sufficient to prove rape by deviate sexual behavior. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Evidence sufficient to support giving "deviate sexual activity" portion of the jury instruction. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Evidence held sufficient to establish that defendant had engaged in deviant sexual activity. *Johnson v. State*, 328 Ark. 526, 944 S.W.2d 115 (1997).

Evidence of deviate sexual activity held sufficient where physical evidence was found on the victim's underwear and DNA evidence of the semen was that of defendant. *Cromeans v. State*, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 235 (May 8, 2003).

Substantial evidence proved defendant raped his 14-year old stepdaughter where (1) according to trial testimony defendant digitally penetrated the victim numerous times before she was 14 years old, (2) the DNA extracted from the victim's mattress, where the abuse occurred, tested positive for defendant's DNA, (3) an expert testified that the victim did not have a hymen, which indicated chronic or long-term sexual contact, and (4) the victim testified that she had been raped by her stepfather and she did not report the abuse because she was scared and was afraid that defendant would not love her anymore. *Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004).

Sufficient evidence supported a rape conviction under § 5-14-103(a)(1)(A) where the victim testified that defendant sexually assaulted her with his fingers and there was ample DNA evidence linking defendant to the crime; the victim's testimony established that defendant engaged in deviate sexual activity with the victim, as defined in subdivision (9) of this

section, by forcible compulsion, as defined in subdivision (2). *Walters v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 518 (Sept. 23, 2004).

Evidence was sufficient to prove defendant engaged in deviate sexual behavior where the victim testified that he performed oral sex on defendant after being threatened and that defendant performed oral sex on him. *Williams v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 593 (Oct. 6, 2005).

Endangerment Offense.

The offense of endangering the welfare of a minor does not encompass allegations of sexual misconduct, and should not be used as an alternative to sexual offense charges. *Leheny v. State*, 307 Ark. 29, 818 S.W.2d 236 (1991).

Forcible Compulsion.

Evidence held insufficient to show forcible compulsion. *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977).

Evidence held sufficient to show forcible compulsion. *Fink v. State*, 265 Ark. 865, 582 S.W.2d 3 (1979); *Jennings v. State*, 268 Ark. 216, 594 S.W.2d 855 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Banks v. State*, 277 Ark. 28, 639 S.W.2d 509 (1982); *Canard v. State*, 278 Ark. 372, 646 S.W.2d 3 (1983); *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996).

Where both victims were children and they were alone every day after school with the defendant, who was their mother's brother and the only adult male living in the house, the jury was justified in finding that their submission was induced through the forcible coercion of the defendant, who stood in loco parentis to the girls. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986).

Where the 13-year-old victim testified that she asked the defendant not to have intercourse with her and that it upset her when he did and the 10-year-old victim testified the defendant told her to "do it or else," there was sufficient proof for the jury to find the acts were consummated against the will of the girls. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986).

The quantum of force need not be considered as long as the act is committed against the will of the victim. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

"Forcible compulsion" under the rape statute is defined as "physical force," which is further defined as any bodily impact, restraint or confinement, or the threat thereof. *Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

"Physical force," as used in subdivision (2) of this section, means any bodily impact, restraint or confinement, or the threat thereof. *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994).

The test for determining whether there was force is whether the act was against the will of the party upon whom the act was committed. *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

Evidence was sufficient to establish forcible compulsion where the defendant abducted the victim at gunpoint, robbed her, took her to a storage facility, and sexually assaulted her, and where there was no evidence of any consensual conduct by the victim. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999).

Penetration.

Penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986).

Evidence of penetration held sufficient, even though the attacker did not have an erection, where victim testified that he "smushed it in." *Stewart v. State*, 331 Ark. 359, 961 S.W.2d 750 (1998).

Evidence was sufficient to sustain a second-degree sexual assault conviction where defendant digitally penetrated the 15 year old victim while the victim was entrusted to defendant's care. *Bowker v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 556 (Sept. 29, 2005).

Physically Helpless.

A fifty-three-year-old nursing home patient who was blind, mentally impaired, partially handicapped, and unable to speak was "physically helpless" as defined by subdivision (5) of this section. *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1996).

Where the victim's physical condition

made it impossible for her to be "aware" of defendant's intentions before he actually commenced the rape, it is likely that the victim was unaware of what was about to occur and of her need to indicate her lack of consent; under these circumstances, the victim was unable to consent due to her physical helplessness. *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1996).

Public Place.

Drunk tank of the city jail was a "public place" as defined by this section. *State v. Black*, 260 Ark. 864, 545 S.W.2d 617 (1977).

The definition of a "public place" does not exclude establishments that limit their fare only to consenting adults and forewarned viewers. *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986).

Sexual Contact.

Testimony held sufficient to show that defendant engaged in sexual contact with victim. *Green v. State*, 7 Ark. App. 175, 646 S.W.2d 20 (1983); *Magar v. State*, 308 Ark. 380, 826 S.W.2d 221 (1992).

A rational juror could reasonably conclude that putting the mouth on the penis constitutes penetration. *Chambers v. Lockhart*, 872 F.2d 274 (8th Cir.), cert. denied, 493 U.S. 938, 110 S. Ct. 335, 107 L. Ed. 2d 324 (1989).

When persons, other than physicians or other persons for legitimate medical reasons, insert something in another person's vagina or anus, it is not necessary that the state provide direct proof that the act was done for sexual gratification. *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989).

When construed in accordance with their reasonable and commonly accepted meaning, and in context with the specific acts described in subsection (8), the words "sexual gratification" leave no doubt as to what behavior is prohibited under the statute. *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991).

Court may assume that the appellant had sexual contact with the victim for sexual gratification, and it is not necessary for the state to prove that he was so motivated. *Holbert v. State*, 308 Ark. 672, 826 S.W.2d 284 (1992).

The touching of the side of girls' breasts

constituted sexual contact under this section, and the court could assume that defendant's purpose in touching the girls was for sexual gratification without specific proof that he was so motivated. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993).

Sexual Gratification.

Sexual gratification is not defined in this section, but the words have been construed in accordance with their reasonable and commonly accepted meanings. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

There was sufficient evidence to support defendant's conviction of rape for performing an act of oral sex upon a nine-year-old boy, in violation of § 5-14-103(a)(1)(C)(i) and subdivision (1) of this section, as "sexual gratification" did not have to be proved by the state and could be inferred from the circumstances; accordingly, defendant's claim that she performed the act in order to obtain drugs and that there was no showing by the state of any sexual gratification in her actions lacked merit. *Eaton v. State*, 85 Ark. App. 320, 151 S.W.3d 15 (2004).

Sexual Intercourse.

By defining sexual intercourse as penetration, however slight, of a vagina by a penis, the draftsmen of the 1975 Criminal Code did not intend to change the crime of rape by requiring a deeper penetration into the body than penetration of the labia, as was formerly necessary; therefore, penetration within the labia up to as far as the hymen held sufficient penetration of the vagina to sustain the defendant's conviction of rape. *Hice v. State*, 268 Ark. 57, 593 S.W.2d 169 (1980).

Nine-year-old victim's testimony that defendant put his penis inside her body, along with her description of defendant's acts, was sufficient evidence of penetration. *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

There was sufficient evidence to sustain a rape conviction under § 5-14-103(a)(1)(C)(i) where the evidence showed

that a child had a life threatening injury to her vaginal wall that was consistent with an intentional injury due to penetration, and the scenarios proffered by defendant did not explain the injuries. *Turbyfill v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 530 (June 29, 2005).

Cited: *Whitmore v. State*, 263 Ark. 419, 565 S.W.2d 133 (1978); *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980); *Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981); *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983); *Kramer v. State*, 283 Ark. 36, 670 S.W.2d 445 (1984); *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985); *Mallett v. State*, 17 Ark. App. 29, 702 S.W.2d 814 (1986); *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986); *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Flurry v. State*, 18 Ark. App. 64, 711 S.W.2d 163 (1986); *Perkins v. State*, 298 Ark. 322, 767 S.W.2d 514 (1989); *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992); *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992); *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992); *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992); *Logan v. Lockhart*, 994 F.2d 1324 (8th Cir. 1993), cert. denied, 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed. 2d 686 (1994); *Clark v. State*, 315 Ark. 602, 870 S.W.2d 372 (1994); *Gadberry v. State*, 46 Ark. App. 121, 877 S.W.2d 941 (1994); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996); *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997); *Sherrill v. State*, 329 Ark. 593, 952 S.W.2d 134 (1997); *Jones v. Clinton*, 990 F. Supp. 657 (W.D. Ark. 1997), appeal dismissed, 138 F.3d 758 (8th Cir. 1998); *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998); *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998); *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002); *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004); *Dep't of Human Servs. v. Parker*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 769 (Nov. 3, 2004); *Davis v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 240 (Apr. 21, 2005).

5-14-102. In general.

(a) The definition of an offense that excludes conduct with a spouse shall not be construed to preclude accomplice liability of a spouse.

(b) When the criminality of conduct depends on a child's being below fourteen (14) years of age and the actor is twenty (20) years of age or older, it is no defense that the actor:

- (1) Did not know the age of the child; or
- (2) Reasonably believed the child to be fourteen (14) years of age or older.

(c)(1) When criminality of conduct depends on a child's being below fourteen (14) years of age and the actor is under twenty (20) years of age, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

(2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be.

(d)(1) When criminality of conduct depends on a child's being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

(2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be.

(e) When criminality of conduct depends on a victim's being incapable of consent because he or she is mentally defective or mentally incapacitated, it is an affirmative defense that the actor reasonably believed that the victim was capable of consent.

History. Acts 1975, No. 280, § 1802; 1985, No. 281, § 1; 1985, No. 870, § 4; 1985, No. 919, § 1; A.S.A. 1947, § 41-1802; Acts 2003, No. 1323, § 2.

Amendments. The 2003 amendment substituted "that excludes" for "excluding" in (a); in (b), substituted "child's" for the first occurrence of "child" and "and the actor is twenty (20) years of age or older"; inserted the present subdivision designa-

tions in (c); in (c)(1), substituted "child's" for the first occurrence of "child" and "the age of" for "a critical age older than," and inserted "and the actor is under the age of twenty (20) years"; inserted "or she" in (c)(2); inserted present (d); redesignated former (d) as (e); and, in (e), substituted "victim's" for the first occurrence of "victim" and inserted "or she."

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Sexual Offenses, 26 UALR L.J. 372.

CASE NOTES

ANALYSIS

Affirmative defenses.
Intent.

Affirmative Defenses.

Defendant's due process rights were not violated by trial court's refusal to allow the introduction of a mistake-of-age defense in a rape trial because the legislature had the authority to define crimes and defenses; moreover, there were excep-

tions to the rule that every crime was required to contain a mens rea element. *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

Intent.

Sexual molestation is an intentional act as a matter of law. *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark.), *aff'd*, 33 F.3d 1476 (8th Cir. 1994).

Cited: Summerlin v. State, 7 Ark. App. 10, 643 S.W.2d 582 (1982); Sansevero v. State, 345 Ark. 307, 45 S.W.3d 840 (2001).

5-14-103. Rape.

(a) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(1) By forcible compulsion;

(2) Who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3)(A) Who is less than fourteen (14) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(3)(A) of this section that the actor was not more than three (3) years older than the victim; or

(4)(A) Who is less than eighteen (18) years of age and the actor is the victim's:

(i) Guardian;

(ii) Uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

(iii) Brother or sister of the whole or half blood or by adoption; or

(iv) Nephew, niece, or first cousin.

(B) It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under subdivisions (a)(3) or (4) of this section that the victim consented to the conduct.

(c) Rape is a Class Y felony.

(d)(1) A court may issue a permanent no contact order when:

(A) A defendant pleads guilty or nolo contendere; or

(B) All of the defendant's appeals have been exhausted and the defendant remains convicted.

(2) If a judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the case, the judicial officer shall enter such orders as are consistent with § 5-2-305.

History. Acts 1975, No. 280, § 1803; 1981, No. 620, § 12; 1985, No. 281, § 2; 1985, No. 919, § 2; A.S.A. 1947, § 41-1803; Acts 1993, No. 935, § 1; 1997, No. 831, § 1; 2001, No. 299, § 1; 2001, No. 1738, § 1; 2003, No. 1469, § 3.

Amendments. The 2001 amendment by No. 299 added present (d).

The 2001 amendment by No. 1738 re-wrote this section.

The 2003 amendment inserted "or she" twice in present (a); inserted present (a)(4) and (b); and redesignated former (a)(2) as former (a)(3).

Cross References. Orders regarding psychiatric examinations of defendant, § 5-2-305.

RESEARCH REFERENCES

ALR. Defense of mistake of fact as to victim's consent in rape prosecution. 102 ALR 5th 447.

UALR L.J. Survey of Arkansas Law, Evidence, 1 UALR L. J. 191.

Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Note, Constitutional Law — Equal Protection — California's Gender Based Statutory Rape Law Upheld. Michael M. v. Superior Court, 450 U.S. 464. 5 UALR L.J. 315.

Note, Charge of Rape by Sexual Intercourse Sufficient to Convict of Rape by Deviate Sexual Activity, etc., 9 UALR L.J. 397.

"Constitutional Law — Child Hearsay Exception in Sexual Abuse Cases — New Arkansas Supreme Court Rule Conflicts with New General Assembly Rule: Which Controls? Vann v. State, 309 Ark. 303, 831 S.W.2d 126 (1992)," 15 UALR L.J. 143.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Annual Survey of Caselaw, Criminal Law, 25 UALR L.J. 927.

Annual Survey of Caselaw, Criminal Procedure, 25 UALR L.J. 946.

CASE NOTES

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Former statute providing penalty for sodomy was not too vague and too broad in

scope, nor did it establish a religion because it regulated acts regarded as sinful by some religious groups. Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 2d 230 (1973) (decision under prior law).

Enforcement as to defendant of former statute providing penalty for sodomy did not violate any constitutional right of privacy where act was not committed in privacy but in an automobile on a public road adjacent to an interstate highway. Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 230 (1973) (decision under prior law).

Former section which provided penalty for sodomy when applied to convict two consenting adults of sodomy did not constitute a violation of defendants' rights to privacy or rights under either federal or state constitutions. Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905, 94 S. Ct. 1610, 40 L. Ed. 2d 110 (1974) (decision under prior law).

Former statute which clearly prohibited sodomy and buggery was not subject to constitutional attack on the grounds of vagueness, even though the statute did not specifically name fellatio, since the conduct for which defendant was convicted had long been held to be prohibited and defendant was placed on notice that his behavior was illegal. Connor v. Hutto, 516 F.2d 853 (8th Cir. 1975), cert. denied,

423 U.S. 929, 96 S. Ct. 278, 46 L. Ed. 2d 257 (1975) (decision under prior law).

Pursuant to a constitutionality challenge under former § 5-14-120, defendant's convictions for 20 counts of violation of a minor in the first degree were all upheld where the statute, in singling out school district employees, did not violate defendant's equal protection rights as the State had an interest in punishing school district employees who abused their positions to facilitate inappropriate relationships with school children. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003).

In General.

Rape is not defined as a continuing offense; it is a single crime that may be committed in either of two ways, by engaging in sexual intercourse or in deviate sexual activity. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

This section controls all prosecutions for the crime of rape involving forcible compulsion, including those instances of forcible rape between spouses. *Jones v. State*, 348 Ark. 619, 74 S.W.3d 663 (2002).

Where eight days before trial the State amended the information against defendants reducing the charge from rape to sexual assault in the first degree, notwithstanding that the proof under the two charges was not the same, defendants were not prejudiced as to their defense based on the totality of the circumstances test, and the fact they waited until the day before trial to file their motion for continuance was further grounds for denying same. *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003).

In the context of a sexual assault against a child charge, an "intimate relationship" is one that is close in friendship or acquaintance, familiar, near, or confidential. *Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

Age of Defendant.

The plain wording of subdivision (a)(3) uses the limiting language of "not more than" so that any months or days beyond twenty-four months takes the defendant out of the affirmative-defense period. *W.D. v. State*, 55 Ark. App. 88, 931 S.W.2d 790 (1996).

Trial court erred in granting a defense motion to transfer a rape case to the juvenile division where (1) defendant was

17 when he committed the rape, (2) he caused a tear in the 14 year-old victim's vaginal area requiring surgery and hospitalization, and (3) he had previously been adjudicated a juvenile offender for first-degree criminal mischief, which involved destruction or causing damage to property: there had been an increase in the seriousness of the alleged offenses, indicating a lack of rehabilitation. *State v. Graydon*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 417 (June 2, 2004).

Age of Victim.

It is clear from §§ 5-14-104, 5-14-106 and this section that the legislature intended the age of the victim to control the severity of the penalty and, in the enactment of two of the degrees of carnal abuse, the taking into account of the relative ages of the participants as well as the absolute age of the victim evidences an intent to exclude from their ambit such conduct between contemporaries or near contemporaries. *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

It is not necessary, where a child under the age of 14 is involved, that any degree of force be employed. *Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

Our public policy, as fixed by the General Assembly, is manifest that victims younger than age 14 are beneath the age of consent and cannot be willing accomplices to sexual intercourse. *Miller v. State*, 318 Ark. 673, 887 S.W.2d 280 (1994).

Where child victim testified that defendant had sexual intercourse with her on at least five occasions, that testimony, standing alone, constituted substantial evidence to support the conviction for a violation of subdivision (a)(3) of this section. *Miller v. State*, 318 Ark. 673, 887 S.W.2d 280 (1994).

Evidence of violation of subdivision (a)(3) of this section held sufficient. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

The statutory rape provisions, subdivision (a)(4) of this section (superseded) and § 5-14-108(a)(4) (repealed) (now § 5-14-125(a)(3)), are subject to a specific statute, § 5-14-102(b), that eliminates knowledge, or even a reasonable belief, of the victim's age as a defense. *Short v. State*, 349 Ark. 492, 79 S.W.3d 313 (2002).

Section 5-1-109(h) extended the statute

of limitations for offenses involving minors and applied retroactively to allow prosecution of violations of § 5-14-103 and former § 41-104; charges may not be barred by the six-year statute of limitations. *Dye v. State*, 82 Ark. App. 189, 119 S.W.3d 513 (2003).

Defendant's due process rights were not violated by trial court's decision to refuse to allow the introduction of a mistake-of-age defense in a rape trial because the legislature had the authority to define crimes and defenses; moreover, there were exceptions to the rule that every crime was required to contain a *mens rea* element. *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

Defendant's convictions as an accomplice to two counts of rape were proper as there was no doubt that defendant was aware that two men who had resided with her raped her daughter at various times when the girl was between eight or nine and 15 years of age, yet defendant concealed her knowledge of the rapes and failed to protect her daughter. *Hutcheson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 608 (Sept. 14, 2005).

Assistance of Counsel.

Defendant's conviction was reversed because of ineffective assistance of counsel. *Lasiter v. State*, 290 Ark. 96, 717 S.W.2d 198 (1986).

Attempt.

When the proof of the commission of rape was complete, its grade could not be reduced to assault with intent to commit rape. *Holmes v. State*, 210 Ark. 574, 196 S.W.2d 922 (1946) (decision under prior law).

Where defendant had taken sexual liberties with his twelve-year-old daughter, even though he had not forced intercourse or prevented her from leaving the bedroom, the evidence of criminal attempt to rape was sufficient. *Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

District court properly denied habeas petition alleging violation of due process where substantial evidence supported attempted rape as the underlying felony for capital felony murder; review of the historical facts showed that the inmate unbuckled the victim's belt, unzipped her jeans, and removed her shirt and socks,

and the inmate was seen by other witnesses in a state of partial undress. *Nance v. Norris*, 392 F.3d 284 (8th Cir. 2004), cert. denied, — U.S. —, 126 S. Ct. 133, 163 L. Ed. 2d 136 (2005).

Deviate Sexual Activity.

Information charging defendant with unnatural sexual relations with nine-year-old boy charged an offense of sodomy. *Mangrum v. State*, 227 Ark. 381, 299 S.W.2d 80 (1957) (decision under prior law).

Allegation that former statute providing penalty for sodomy did not cover the act of fellatio was without merit. *Connor v. State*, 253 Ark. 854, 490 S.W.2d 114 (1973), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 2d 230 (1973) (decision under prior law).

Where the defendant fondled victim and put the victim's penis in his mouth, the defendant could properly be tried and convicted for deviate sexual activity, despite the defendant's contention that the criminal statutes as written did not include his actions, in that only the body of the accused was penetrated, and not the body of the victim. *Hoggard v. State*, 277 Ark. 117, 640 S.W.2d 102 (1982), cert. denied, 460 U.S. 1022, 103 S. Ct. 1273, 75 L. Ed. 2d 495 (1983).

Evidence sufficient to establish that defendant had engaged in deviant sexual activity. *Johnson v. State*, 328 Ark. 526, 944 S.W.2d 115 (1997).

The testimony of the three children was more than sufficient to sustain the four counts of rape involving deviate sexual activity. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997).

Evidence was sufficient to support defendant's conviction for rape by engaging in "deviate sexual activity" with a child less than 14 where the testimony of the rape victim alone was sufficient to sustain a rape conviction; in addition, the evidence was sufficient for the jury to conclude without resorting to suspicion or conjecture that oral and anal sex was deviate sexual activity and that the victim was 13 years old when he and defendant engaged in this activity. *McDuffy v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 599 (Oct. 14, 2004).

Evidence.

—In General.

Where a state information charged the

defendant with rape by engaging in sexual intercourse by forcible compulsion, evidence by the prosecution need not be restricted to that allegation without mentioning any allegation regarding deviate sexual activity, since this section includes deviate activity in its definition of rape. *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981).

Where the defendant was being prosecuted for the rape and incest of his children, a mistrial was not required on the ground that the prosecutor said the relevancy of the discussion of the child support payments had to do with the love and concern of the defendant for his children; the admonition to the jury was sufficient. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

The court should not have permitted the victim to testify about the effect the rape had upon her marriage; however, the state's proof was so strong that the cause of justice would not be served by the granting of a new trial. *Thomas v. State*, 289 Ark. 72, 709 S.W.2d 83 (1986).

Law jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse. *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986).

In prosecution for rape, the trial court's denial of the defendant's motion in limine to prevent his being asked on cross-examination, should he have elected to take the stand, whether he had been previously convicted of the crime of rape was not subject to review where the defendant did not assert he would take the stand and made no record of what his testimony would be, even though the trial court took the motion under advisement until the state had rested. *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986).

Intent to rape might be proved by circumstances surrounding the assault from which the intent may be inferred. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Proof of an assailant's intention to have sexual intercourse with the victim is not sufficient, unless an intention to accomplish that purpose by force may be ascertained from acts or words connected with the assault and there is some overt act toward the accomplishment of that purpose. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

Victim's inability to fix definite date of rape does not defeat the charge, and any discrepancies in the testimony concerning the date of the offense were for the jury to resolve. *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990).

The trial court did not abuse its discretion in denying a continuance so a DNA expert could be appointed where results from the state's test samples were available to defendant four months prior to the trial date and defendant waited until one week before trial to request a DNA expert. *Munoz v. State*, 340 Ark. 218, 9 S.W.3d 497 (2000).

There was sufficient evidence to sustain a rape conviction under subdivision (a)(1)(C)(i) of this section where the evidence showed that a child had a life threatening injury to her vaginal wall that was consistent with an intentional injury due to penetration, and the scenarios proffered by defendant did not explain the injuries. *Turbyfill v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 530 (June 29, 2005).

—Admissibility.

Evidence as to victim's prior sexual conduct held inadmissible. *Houston v. State*, 266 Ark. 257, 582 S.W.2d 958 (1979); *Pruitt v. State*, 8 Ark. App. 350, 652 S.W.2d 51 (1983).

The offense of rape is committed if the person engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion and, therefore, prior sexual conduct of the victim has no relevancy to the issue. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

Where prosecutor in rape case elicited from the victim testimony that she had been a virgin prior to the rape, the question and answer were not so prejudicial as to require mistrial and trial court acted properly in continuing the trial after admonishing the jury to disregard the improper question and answer. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

The rape shield statute only excludes evidence of prior sexual conduct of the victim, and the defendant may testify at trial as to the actions of the prosecuting witness on the night of the alleged rape. *Kemp v. State*, 270 Ark. 835, 606 S.W.2d 573 (1980).

For cases discussing admissibility of

photographic or video taped evidence, see *French v. State*, 271 Ark. 445, 609 S.W.2d 42 (1980); *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), *aff'd*, 288 Ark. 546, 708 S.W.2d 74 (1986).

While generally a rape victim's report to a third party that a rape occurred is admissible to prove that she did not remain silent, or sometimes as an excited utterance, the details of her report are not normally admissible, except when admitted to rehabilitate a witness whose testimony is seriously questioned or impeached. *Urquhart v. State*, 273 Ark. 486, 621 S.W.2d 218 (1981).

For cases discussing the introduction into evidence of defendant's prior convictions, see *Williams v. State*, 6 Ark. App. 410, 644 S.W.2d 608 (1982); *Bryan v. State*, 288 Ark. 125, 702 S.W.2d 785 (1986).

Where the defendant's counsel had elicited the initial testimony from the emergency room doctor about the mental processes of the children who were allegedly victims of rape and incest, it was not error to allow the admission of the testimony. *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986).

Evidence of prior sexual contact between the defendant stepfather and the stepdaughter rape victim was admissible as probative of both the victim's fear of the defendant and the fact that a rape could have occurred in the bathroom of a house which might have been full of people, after the accused merely shoved the victim to the floor. *Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986).

While the psychologist should not have been allowed to testify that the history given by the victim was consistent with sexual abuse, the testimony merely provided the jurors with a hint of the testimony which they would receive from the victim; therefore, the error was harmless and did not affect the judgment. *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986).

The trial court did not err in admitting a physician's testimony that the alleged victim told the physician that her father, the defendant, had intercourse with her, because statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably per-

tinent to treatment. *Stallnacker v. State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986).

Where, in prosecution for rape, the victim was unemployed and unmarried, but an in-chambers proffer showed that the victim was supported by her fiancé, the victim's manner of support of herself and a daughter was of no consequence. *Johnson v. State*, 290 Ark. 166, 717 S.W.2d 805 (1986).

Where the defendant was charged with rape of his stepdaughter, and on direct examination he testified he had not raped her or any of the other children who had been living with him and their now deceased mother, it was not error to permit the prosecution to present rebuttal testimony from another, younger stepdaughter that she too had been raped by the defendant. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986).

In prosecution for sexual offenses, if the prosecutrix denies on cross-examination that she made similar accusations against others or admits making the statements but asserts them to have been true, then the defense is permitted to prove that the statements were made, if that is not admitted, and that they were false; that proof would be admissible not merely as affecting the prosecutrix's credibility but also as raising a possible doubt about the truth of the present charge. *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986).

Evidence of marginal relevance admitted. *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986); *Barrett v. State*, 23 Ark. App. 144, 744 S.W.2d 741 (1988).

Where there was abundant evidence of the defendant's guilt of rape, other testimony was held harmless error. *Jarreau v. State*, 291 Ark. 60, 722 S.W.2d 565 (1987).

Testimony of girls concerning defendant's sexual acts with them was admissible, in rape case involving other victims, under Evid. Rule 404(b) to show motive, intent, or plan; the evidence was especially probative since defendant denied having any sexual contact with the victims, blamed another person, and stated that it was physically impossible for him to have sexual intercourse. *Morgan v. State*, 308 Ark. 627, 826 S.W.2d 271 (1992).

Sexually explicit photograph was relevant to show that the photographed female was indeed the victim and to corroborate the victim's testimony that

defendant raped her. *Watson v. State*, 308 Ark. 643, 826 S.W.2d 281 (1992).

The instrumentality used to inflict fear is patently relevant to crimes of rape, kidnapping and aggravated robbery, all of which include an element of force for perpetration. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Knife found at crime site was relevant to corroborate the testimony of the victim concerning stabbings and no prejudice resulted to the defendant from its admission into evidence. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992).

Evidence of rape victim's fear and repulsion was relevant to the issue of compulsion and was properly admitted. *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

Several photographs depicting the act of sexual intercourse were admissible over objection to their duplicative effect since photographic evidence is not inadmissible on grounds that it is cumulative or unnecessary due to admitted or proven facts. *Watson v. State*, 308 Ark. 643, 826 S.W.2d 281 (1992).

Modus operandi evidence is admissible in rape cases to prove a common plan. *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

The trial court did not abuse its discretion by ruling that the proffered testimony regarding child victim's prior inconsistent statements was inadmissible, as the statements that victim had been sexually abused by her stepfather were properly excluded under the rape-shield statute. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002).

In a juvenile proceeding, where the juvenile sought to introduce evidence of the victim's sexual history, and the victim was under the age of 14, the child's sexual past was completely irrelevant to the question of whether or not the juvenile engaged in sexual activity with the victim. *M. M. v. State*, 350 Ark. 328, 88 S.W.3d 406 (2002).

Defendant was convicted of rape based on the victim's testimony, along with the testimony of a doctor that the victim's hymen had an injury consistent with sexual abuse; however, his conviction was reversed on appeal because the circuit judge erred by admitting hearsay statements that defendant was accused of rape in another state without any direct proof

of the prior offense. *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004).

—Codefendants.

Evidence of kidnapping and rape held sufficient, even though a co-defendant actually committed the rape, where defendant entered victim's house first while brandishing a gun, tackled her, permitted her to be restrained with duct tape, and threatened to kill her if she looked at them. *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998).

—Confessions.

Where the officers testified that the defendant had not wanted to make a statement when he was arrested, but after three or four days he said he wanted to see the sheriff and make a statement, at the hearing the defendant admitted the truth of parts of the statement, relating to his childhood and his first job, and his description of the criminal incident was the same as that given by the child in her testimony at the trial, the defendant's signed confession was voluntary. *Huffman v. State*, 288 Ark. 321, 704 S.W.2d 627 (1986).

The trial court was correct in not deleting portions of the defendant's confession which implied that he had previously engaged in similar sexual conduct with the victim, since direct proof of the defendant's earlier sexual relations with the victim would have been admissible in evidence. *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986).

Where the defendant was warned of his Miranda rights, both the deputy prosecutor and the police officer who were present when the statement was taken testified that the defendant cried at times and appeared to be upset, but he freely admitted his guilt and said he was ready to take his punishment, and the verbatim transcription of the statement confirmed the other proof of voluntariness, the Supreme Court found no basis for disagreeing with the trial judge's conclusion that the defendant's confession was voluntary. *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986).

Where defendant confessed to police that he raped victim on two occasions and at trial there was no substantive proof of a second rape, it was error not to grant defendant's motion for acquittal as to one

count of rape. *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990).

The fact that defendant was twenty years old, had an I.Q. of 77, and was reading on a third-grade level were factors to be considered, but they alone did not suffice to warrant the suppression of defendant's confession. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000).

—Corroboration.

It was competent for the state to prove the fact that the prosecuting witness made complaint of her injury but not the details as to what she said, unless the defense undertook to impeach her testimony on that point, in which case the particular facts stated by her could be proved in corroboration of her testimony. *Skaggs v. State*, 88 Ark. 62, 113 S.W. 346 (1908); *Sexton v. State*, 91 Ark. 589, 121 S.W. 1075 (1909) (preceding decisions under prior law).

The testimony of prosecuting witness who did not consent, need not be corroborated. *Hummel v. State*, 210 Ark. 471, 196 S.W.2d 594 (1946); *Havens v. State*, 217 Ark. 153, 228 S.W.2d 1003 (1950) (preceding decisions under prior law).

Testimony of victim standing alone was legally sufficient under indictment. *McDonald v. State*, 225 Ark. 38, 279 S.W.2d 44 (1955); *Sales v. State*, 291 Ark. 338, 724 S.W.2d 469 (1987); *McCoy v. State*, 293 Ark. 49, 732 S.W.2d 156 (1987).

Corroboration of victim's testimony was not necessary to a conviction of rape. *McDonald v. State*, 225 Ark. 38, 279 S.W.2d 44 (1955); *Bailey v. State*, 227 Ark. 889, 302 S.W.2d 796, cert. denied, 355 U.S. 851, 78 S. Ct. 77, 2 L. Ed. 2d 59 (1957) (preceding decisions under prior law); *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982); *Lackey v. State*, 283 Ark. 150, 671 S.W.2d 757 (1984); *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Cope v. State*, 292 Ark. 391, 730 S.W.2d 242 (1987); *Stewart v. State*, 297 Ark. 429, 762 S.W.2d 794 (1989); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

Trial court properly allowed articles of the defendant's clothing to be introduced into evidence together with testimony that there were human bloodstains on the clothing, where this evidence tended to corroborate the testimony of the rape victim, the police officers, and the medical examiner. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

In a prosecution for rape, the testimony of the rape victim does not have to be corroborated by other testimony, since it is the jury's function to decide whether to believe the alleged victim or the defendant. *Urquhart v. State*, 273 Ark. 486, 621 S.W.2d 218 (1981).

Uncorroborated testimony of victim held sufficient to support the defendant's conviction for rape. *Sanders v. State*, 277 Ark. 159, 639 S.W.2d 733 (1982); *Cope v. State*, 292 Ark. 391, 730 S.W.2d 242 (1987); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

The testimony of the prosecutrix alone provided substantial evidence to support the conviction. *Gunter v. State*, 313 Ark. 504, 857 S.W.2d 156, cert. denied, 510 U.S. 948, 114 S. Ct. 391, 126 L. Ed. 2d 339 (1993).

Testimony of the rape victim alone suffices and need not be corroborated to sustain a conviction. *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996).

The testimony of a rape victim does not have to be corroborated by other testimony. *Sherrill v. State*, 329 Ark. 593, 952 S.W.2d 134 (1997).

The evidence was sufficient to convict defendant of rape of his estranged wife where defendant's admissions corroborated the victim's testimony. *Jones v. State*, 348 Ark. 619, 74 S.W.3d 663 (2002).

—DNA.

The denial of a continuance which would deprive an accused of the chance to have an independent review of DNA analysis must be closely examined. Citing *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992). *Munoz v. State*, 340 Ark. 218, 9 S.W.3d 497 (2000).

In a rape case, although defendant argued that a blood sample had been illegally taken from him when he was incarcerated in 1997 for non-payment of child support, which was not a qualifying offense named in the State Convicted Offenders DNA Database Act, § 12-12-1101 et seq., and it was based on that sample that the State obtained a "hit," because defendant had submitted to another blood sample in 2000 when incarcerated for burglary, pursuant to § 12-12-1109(a), the appellate court found that the State met its burden of proof in establishing that the DNA evidence was admissible, pursuant to the inevitable discovery doctrine.

Haynes v. State, 354 Ark. 514, 127 S.W.3d 456 (2003), cert. denied, 541 U.S. 1047, 124 S. Ct. 2168, 158 L. Ed. 2d 740 (2004).

—Identification.

Identification testimony and the physical evidence accidentally dropped at the scene by the defendant were admissible, and evidence was sufficient to sustain the conviction of rape, burglary, and robbery. Monk v. State, 320 Ark. 189, 895 S.W.2d 904 (1995).

Photographic array identification evidence held sufficient. Phillips v. State, 327 Ark. 1, 936 S.W.2d 745 (1996).

Identification evidence, based on victim's testimony, DNA matching, and a palm print, held sufficient. Stewart v. State, 331 Ark. 359, 961 S.W.2d 750 (1998).

Although codefendant gave varying statements about defendant's participation and the victim was unable to identify the defendant, the identification evidence held sufficient in view of the scientific evidence and the testimony of the codefendant. Wilson v. State, 332 Ark. 7, 962 S.W.2d 805 (1998).

Where victim testified that she was working at the hospital during the night shift when defendant, her supervisor, pushed her to the ground and raped her, the evidence of rape was sufficient to support revocation of defendant's probation; although the victim had difficulty identifying defendant at the rape trial because he changed his hairstyle, added facial hair, and gaining weight since the time of the rape, during the revocation proceeding the victim positively identified defendant as the rapist and the medical director for the hospital also recognized defendant in the courtroom. Stewart v. State, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 720 (Oct. 13, 2004).

—Other Crimes, Wrongs, or Acts.

Permitting an eight-year-old child to develop a severe case of trench foot is a form of neglect by the parent and such neglect of a child's physical needs is necessarily a form of abuse; hence, a father's perpetration of child abuse by neglect is relevant to a case of sexual abuse against that same child, when both forms of abuse are occurring at the same time. Such evidence is pertinent in that it establishes an intentional pattern of abusive behavior

on the part of the parent toward the child — the first by neglecting her basic hygienic needs and the second by soliciting her to engage in sexual activity. A contemptible lack of caring for a child's essential healthcare needs easily intertwines with sexual abuse of the child; both forms of abuse are intentional, and evidence of the lack of care, concern, and respect for a child's well-being is admissible under Evid. Rules 403 and 404(b). Lindsey v. State, 319 Ark. 132, 890 S.W.2d 584 (1994).

In trials for incest or carnal abuse, the State may show other acts of intercourse between the same parties. Mosley v. State, 325 Ark. 469, 929 S.W.2d 693 (1996).

Evidence of prior conviction of a sexual offense involving his stepdaughter held admissible in defendant's trial for rape of his daughter, given the similarity of the prior conviction to the current charges and the parental relationship of the defendant with the two victims. Mosley v. State, 325 Ark. 469, 929 S.W.2d 693 (1996).

Prisoner's argument, that the State Supreme Court improperly relied upon evidence of the prisoner's transgressions on another occasion with the date-rape victim as evidence of guilt in violation of Ark. R. Evidence 404(b) was without basis as the evidence showed plan and modus operandi by demonstrating that the prisoner had gone through a similar sequence with the date-rape victim — taking the victim on a drive to another town, drugging the victim with Rohypnol such that the victim was unconscious, taking the victim to a bed and breakfast, and removing the victim's clothes. Sera v. Norris, 400 F.3d 538 (8th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 283, 163 L. Ed. 2d 250 (2005).

—Pedophile Exception.

Evidence of previous sexual contact with juvenile victim held admissible under the "pedophile exception" to Evid. Rule 404. Dougan v. State, 330 Ark. 827, 957 S.W.2d 182 (1997).

Where the charges against defendant had been severed because the rape counts that were the subject of the appeal involved one victim and the violation-of-a-minor charges involved two other girls, the trial court properly allowed the testimony of the two other girls in defendant's trial for rape under the so-called "pedophile exception" to Ark. R. Evid. 404(b) to

show motive, intent, or plan and to help prove the depraved sexual instinct of the accused. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002).

—Sexual Gratification.

Evidence was sufficient to establish that the defendant's assault upon his wife was for purposes of sexual gratification, notwithstanding his wife's testimony that she did not think that the attack was sexual in nature or that it was the defendant's intent to be sexually gratified by it, where the wife testified (1) that he put his hand inside her vagina and squeezed her, (2) that while he was doing this, he was lying on top of her, ripping at her panties and pantyhose, and (3) that he told her more than one time that if she did not want to be with him, he would fix it so that she could not be with another man. *Farmer v. State*, 341 Ark. 220, 15 S.W.3d 674 (2000).

There was sufficient evidence to support defendant's conviction of rape for performing an act of oral sex upon a nine-year-old boy, in violation of subdivision (a)(1)(C)(i) and § 5-14-101(1), as "sexual gratification" did not have to be proved by the state and could be inferred from the circumstances; accordingly, defendant's claim that she performed the act in order to obtain drugs and that there was no showing by the state of any sexual gratification in her actions lacked merit. *Eaton v. State*, 85 Ark. App. 320, 151 S.W.3d 15 (2004).

—Sufficiency.

Evidence held sufficient to support conviction of rape by deviate sexual activity. *Woolford v. State*, 202 Ark. 1010, 155 S.W.2d 339 (1941); *Mangrum v. State*, 227 Ark. 381, 299 S.W.2d 80 (1957) (preceding decisions under prior law); *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985); *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987); *Peebles v. State*, 305 Ark. 338, 808 S.W.2d 331 (1991).

Evidence held sufficient to support conviction of rape. *Stevens v. State*, 231 Ark. 734, 332 S.W.2d 482 (1960); *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963) (preceding decisions under prior law); *McCraw v. State*, 262 Ark. 707, 561 S.W.2d 71 (1978); *Jeffers v. State*, 268 Ark. 329, 595 S.W.2d 687 (1980); *Canard v. State*, 278 Ark. 372, 646 S.W.2d 3 (1983); *Cope v. State*, 292 Ark. 391, 730 S.W.2d 242

(1987); *McCoy v. State*, 293 Ark. 49, 732 S.W.2d 156 (1987); *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987); *Lewis v. State*, 295 Ark. 499, 749 S.W.2d 672 (1988); *Jones v. State*, 297 Ark. 499, 763 S.W.2d 655 (1989); *Lilly v. State*, 300 Ark. 53, 776 S.W.2d 347 (1989); *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990); *Phills v. State*, 301 Ark. 265, 783 S.W.2d 348 (1990); *Vick v. State*, 301 Ark. 296, 783 S.W.2d 365 (1990); *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990); *Wilson v. State*, 307 Ark. 21, 817 S.W.2d 203 (1991); *Franklin v. State*, 308 Ark. 539, 825 S.W.2d 263 (1992); *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992); *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992); *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993); *Chenoweth v. State*, 321 Ark. 522, 905 S.W.2d 838 (1995); *Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999); *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000).

Evidence held sufficient to establish that defendant was guilty, at least, of an attempt to commit rape of a female under 14 years of age. *Treat v. State*, 253 Ark. 367, 486 S.W.2d 16 (1972) (decision under prior law).

Evidence held sufficient to support the jury's finding that the prosecutrix was sexually assaulted. *Rogers v. State*, 257 Ark. 144, 515 S.W.2d 79, cert. denied, 421 U.S. 930, 95 S. Ct. 1656, 44 L. Ed. 2d 87 (1974) (decision under prior law).

Circumstantial evidence was sufficient to sustain verdict on rape charge where it gave rise to more than a mere suspicion and the inference which might reasonably have been deduced from it would leave little room for doubt. *Whitmore v. State*, 263 Ark. 419, 565 S.W.2d 133 (1978).

Evidence held sufficient to support the defendant's conviction even though the victim was unable to personally identify the defendant as the person who raped her. *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Evidence held sufficient to support conviction of attempted rape. *Berry v. State*, 278 Ark. 578, 647 S.W.2d 453 (1983).

In a rape prosecution, the positive identification of a defendant by a prosecutrix alone is sufficient evidence to sustain a conviction. *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986).

The age of the victim and the relationship of the victim to the assailant are key factors in weighing the sufficiency of evidence of force to prove rape. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986); *Kiefer v. State*, 297 Ark. 464, 762 S.W.2d 800 (1989).

The testimony of the alleged victim which shows penetration is enough for conviction. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992).

Evidence held sufficient to support court's refusal to find defendant unfit for trial. *Dyer v. State*, 290 Ark. 405, 720 S.W.2d 297 (1986).

Evidence was sufficient to support rape conviction, given the corroborating testimony of the victim's husband and the police officers who investigated the incident. *McCoy v. State*, 293 Ark. 49, 732 S.W.2d 156 (1987).

Victim's testimony satisfies the requirement that there be substantial evidence that the defendant committed the rape. *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987); *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988); *Jones v. State*, 297 Ark. 499, 763 S.W.2d 655 (1989); *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989); *Franklin v. State*, 308 Ark. 539, 825 S.W.2d 263 (1992).

When persons, other than physicians or other persons for legitimate medical reasons, insert something in another person's vagina or anus, it is not necessary that the state provide direct proof that the act was done for sexual gratification. *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989).

Voice identification held sufficient. *White v. State*, 303 Ark. 30, 792 S.W.2d 867 (1990).

The requirement of substantial evidence was satisfied by the rape victim's testimony. *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992).

Where a prosecutrix positively identifies a defendant or there exists other evidence sufficient to support a rape conviction, a trial court cannot grant a directed verdict or acquittal. *Foster v. Lockhart*, 811 F. Supp. 1363 (E.D. Ark. 1992), *aff'd*, 9 F.3d 722 (8th Cir. 1993).

Evidence of restraint shown exceeded the restraint necessary to prove the crime of rape. *Aaron v. State*, 312 Ark. 19, 846 S.W.2d 655 (1993).

Evidence of sexual gratification held sufficient. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

Defendant was properly convicted on three counts of rape for having sexual intercourse with three girls, whose ages were nine, eight, and six, and properly sentenced to three consecutive life sentences. *Langley v. State*, 315 Ark. 472, 868 S.W.2d 81 (1994).

Evidence of rape of five- and four-year-old females and sexual misconduct with one-year-old female held sufficient. *Clark v. State*, 315 Ark. 602, 870 S.W.2d 372 (1994).

An 11-year-old boy's testimony that defendant touched his penis inside his underwear and hugged him, asked him to perform oral sex, and the boy's description in graphic detail how defendant performed oral sex on him on at least two separate occasions, was sufficient to prove rape by deviate sexual behavior. *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

Evidence that defendant raped his twelve-year-old daughter held sufficient. *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995).

Blood and DNA evidence tested two years after the offense held sufficient to support rape conviction. *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996); *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997).

Evidence of rape held sufficient even though victim could not remember whether the incident had occurred in the spring or the fall. *Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998).

Evidence that victim was alive when she was raped held sufficient. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Evidence held sufficient to support the defendant's conviction for rape of a 5-year-old girl where the defendant admitted that he kidnapped, handcuffed, and stripped the girl, the girl stated that he had placed his penis in her mouth, and there was medical evidence that the girl's vaginal area showed redness on the night of the incident. *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998).

Evidence was sufficient to show forcible compulsion in the prosecution of the defendant for the rape of his daughters where one daughter testified (1) that the

defendant had intercourse with her on a regular basis from the time that she was 12 until she was 18 years old; (2) that when she was 12 years old, he forced her to have sex with him, and that it was not something that she wanted to do, but that she did it because she was afraid of him; (3) that the defendant had hurt her and other members of her family; and (4) that, in that regard, there was an incident when the defendant gathered the six family members in a room, lined up six bullets, and shot himself to prove a point to the family. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999).

Evidence in the form of testimony of a mother and her daughter and son, both of whom were under the age of 14, that defendant, who was husband and father to the victims, sexually assaulted the daughter by inserting his finger into the daughter's vagina and forcing the daughter to perform oral sex on defendant, forcing the son and daughter to have sexual intercourse, and forcing the son to have intercourse with the mother, along with medical evidence of injuries to the daughter consistent with sexual assault, supported defendant's conviction for rape and three counts of accomplice to rape. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

There was sufficient evidence to convict defendant of attempted rape against an 11-year old fictional girl, who was a product of an internet email sting operation by police, because there was no defense of impossibility to attempt crimes, pursuant to § 5-3-201(a)(2), and the fact that defendant drove from his home state to the alleged home state of the girl with sexual accessories and photographic equipment represented a substantial step towards completing the commission of the crime, pursuant to subdivision (a)(1)(C)(i) of this section. *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003).

Evidence of rape held sufficient where the testimony of the victim supplied all of the elements of rape, there was sufficient corroboration of the victim's testimony with physical evidence, and the victim provided testimony of force by defendant's threats with a shotgun and his continuing threats throughout the course of the abduction. *Cromeans v. State*, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 235 (May 8, 2003).

Where the only evidence of sexual inter-

course or deviate sexual activity was the videotape of a prior encounter between petitioner and the victim which the jury had found to establish sexual abuse, the evidence was constitutionally insufficient to find that the act of sexual intercourse or deviate sexual activity occurred again on the night that petitioner and the victim went to the Macaroni Grill, and no rational fact-finder could reasonably have inferred the necessary elements of rape beyond a reasonable doubt under these circumstances. *Sera v. Norris*, 312 F. Supp. 2d 1100 (E.D. Ark. 2004).

Evidence was sufficient to convict defendant of rape where the victim testified that defendant forcibly held her down and penetrated her with his penis, and the arresting officer noticed that the victim had blood on her lip and defendant's shirt had blood on it; the jury was certainly within its right to believe the officer's testimony that indicated that force was used. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004).

Evidence was sufficient to sustain defendant's rape conviction where the child victim testified that defendant told her to put her mouth on his penis, and that he licked her "private parts." *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Substantial evidence proved defendant raped his 14-year old stepdaughter where (1) according to trial testimony defendant digitally penetrated the victim numerous times before she was 14 years old, (2) the DNA extracted from the victim's mattress, where the abuse occurred, tested positive for defendant's DNA, (3) an expert testified that the victim did not have a hymen, which indicated chronic or long-term sexual contact, and (4) the victim testified that she had been raped by her stepfather and she did not report the abuse because she was scared and was afraid that defendant would not love her anymore. *Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004).

Sufficient evidence supported a rape conviction where the victim testified that defendant sexually assaulted her with his fingers and there was ample DNA evidence linking defendant to the crime; the victim's testimony established that defendant engaged in deviate sexual activity with the victim, as defined in § 5-14-101(9), by forcible compulsion, as defined

in § 5-14-101(2). *Walters v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 518 (Sept. 23, 2004).

Defendant was properly convicted of four counts of rape in light of the testimony regarding the rape of two victims, the incident involving another, the vehicle and license-plate information, the presence of duct tape in the victim's garbage can, and the unequivocal identification by the victims and witnesses of defendant as the perpetrator. *Moore v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 627 (Sept. 22, 2004).

Defendant's conviction for rape was affirmed as the victim's testimony, that he performed oral sex on defendant after being threatened and that defendant performed oral sex on him, was sufficient to convict defendant under subdivision (a)(1)(C)(i) of this section. *Williams v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 593 (Oct. 6, 2005).

—Testimony of Minor Victims.

The trial court did not err in allowing the minor rape victim's testimony to be admitted where the trial court was apparently convinced of the victim's ability to understand the consequences of not telling the truth. *Chambers v. State*, 275 Ark. 177, 628 S.W.2d 306 (1982).

The trial court did not abuse its discretion in finding the nine-year-old victim competent to testify where her testimony was consistent with that of her sister concerning events in question, the inconsistencies in her testimony did not so exceed the bounds to be expected with a juvenile witness as to make the decision to allow her testimony an abuse of discretion, and her use of words she had heard when discussing the case with adults was not proof that the trial court was wrong in assessing her competency. *Clifton v. State*, 289 Ark. 63, 709 S.W.2d 63 (1986).

While the psychologist should not have been allowed to testify that the history given by the victim was consistent with sexual abuse, the testimony merely provided the jurors with a hint of the testimony which they would receive from the victim; therefore, the error was harmless and did not affect the judgment. *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986).

In a child rape case, the matter of the competency of the child is primarily for

the trial judge to decide, as he is better able than the appeals court to judge the child's intelligence and understanding of the necessity for telling the truth. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986).

Even though the child victim may not use the correct terms for the body part, but instead uses his or her own terms, or demonstrates a knowledge of what and where those body parts referred to are, that will be sufficient to allow the jury to believe that the act occurred. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Stewart v. State*, 297 Ark. 429, 762 S.W.2d 794 (1989).

Uncorroborated testimony of minor victims is sufficient evidence to support convictions of rape and attempted rape. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Testimony of child victim that in addition to forcing him to perform oral sex, the defendant also subjected him to anal sex, was properly admitted where such testimony helped to prove the depraved sexual instinct of the accused. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Eight-year-old victim was competent to testify. *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987).

The trial court has broad discretion in determining the competency of young witnesses and exercise of that discretion will not be disturbed on appeal absent clear abuse or manifest error. A witness is competent if able to understand the obligation to tell the truth and the consequences of false swearing and is capable of receiving and retaining accurate impressions and communicating a reasonable statement of what has been seen, felt, or heard. *Barrett v. State*, 23 Ark. App. 144, 744 S.W.2d 741 (1988).

When minor victim identifies defendant and testifies that he raped her, such testimony, standing alone, is sufficient to sustain a conviction if the witness is competent. *Jones v. State*, 300 Ark. 565, 780 S.W.2d 556 (1989).

The uncorroborated testimony of a child rape victim is sufficient evidence to sustain a conviction. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

Testimony by a witness to the effect that the seven-year-old rape victim told the witness that defendant had told the victim he would kill the victim if she told about

the sexual acts held admissible under Evid. Rule 803(3). *Bradley v. State*, 327 Ark. 6, 937 S.W.2d 628 (1997).

There was no constitutional violation when the trial court allowed the child witnesses in a sexual molestation case to testify while sitting in a witness chair that faced outside of defendant's line of sight, and while they did not have to look at the defendant while they testified, they were not precluded from doing so. *Smith v. State*, 340 Ark. 116, 8 S.W.3d 534 (2000).

Confrontation of a witness does not mean in whatever way and to whatever extent a defendant might wish. *Smith v. State*, 340 Ark. 116, 8 S.W.3d 534 (2000).

There was sufficient evidence to convict the defendant of rape where the victim who was under the age of 14 testified that she was "pretty sure" she was the sleeping victim shown in a video tape of the rape and that the defendant had touched her inappropriately on other occasions. *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001).

—Violence.

The fact that victim was caused to bleed when defendant inserted his finger into her vagina was sufficient evidence of violence in connection with committing a violation of subdivision (a)(3). *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996).

—Witnesses.

Where the testimony of the witness at the first trial was extensive and significant, the reading of it to the jury at the second trial, where the state's showing of the unavailability of the witness was insufficient, was prejudicial. *Lackey v. State*, 288 Ark. 225, 703 S.W.2d 858 (1986).

Where doctor's testimony at the first trial described at length what the victim had said about the details of the alleged rape on the night she was examined by him, his testimony was so significant as to require that the jury at the second trial see his demeanor. *Lackey v. State*, 288 Ark. 225, 703 S.W.2d 858 (1986).

In prosecution for rape, the trial court did not abuse its discretion in allowing the state's expert, a serologist, to testify that the proportion of the male population with "A" blood type, who were also secreters and were vasectomized would equal 60 in

10,000, where a report of the defendant's vasectomy had been read to the jury, the serology expert was then qualified, and the defense had the opportunity to expose the limited applicability of the expert's statement and used that opportunity with fair success. *Dumond v. State*, 290 Ark. 595, 721 S.W.2d 663 (1986).

Forcible Compulsion or Consent.

It was not the persistence with which the party accused intended to prosecute his illegal design, but the force actually used, that was an element in the crime of rape. *Dawson v. State*, 29 Ark. 116 (1874) (decision under prior law).

Rape could be committed on a female under the age of puberty, or one so young as not to be capable of giving her consent. *Dawson v. State*, 29 Ark. 116 (1874) (decision under prior law).

Force was an essential element in the crime of rape; it had to be committed forcibly and against the will of the female. *Bradley v. State*, 32 Ark. 704 (1878) (decision under prior law).

If carnal connection was had against the will of the female or she was incapable, from tender years, or want of mental and physical development, of exercising a will, with reference to the act, it was rape. *Coates v. State*, 50 Ark. 330, 7 S.W. 304 (1888) (decision under prior law).

If a man had, or attempted to have, connection with a woman while she was asleep, it was no defense that she did not resist, as she was then incapable of resisting. *Harvey v. State*, 53 Ark. 425, 14 S.W. 645 (1890) (decision under prior law).

It was not error in a rape case to refuse to instruct the jury that it was the duty of the prosecutrix when she thought a rape was about to be committed on her to make an outcry though, if requested, the court should have told the jury that her failure to make an outcry might be considered in connection with the other facts and circumstances adduced in evidence as tending to show want of resistance. *Jackson v. State*, 92 Ark. 71, 122 S.W. 101 (1909) (decision under prior law).

The words "forcibly and against her will" mean the same thing as "without her consent." *State v. Peyton*, 93 Ark. 406, 125 S.W. 416 (1910) (decision under prior law).

Failure to make outcry because of fear did not prevent the crime from being rape. *Threet v. State*, 110 Ark. 152, 161 S.W. 139 (1913) (decision under prior law).

Age and lack of capacity to commit the sexual act was no defense. *Hunt v. State*, 114 Ark. 239, 169 S.W. 773 (1914) (decision under prior law).

In a prosecution for rape, the question for the jury to determine was whether the assault was with force and not merely whether an outcry was made or whether there was reasonable cause for failure to make an outcry. *Crawford v. State*, 132 Ark. 518, 201 S.W. 784 (1918) (decision under prior law).

Evidence held sufficient to show forcible compulsion. *Allison v. State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Fink v. State*, 265 Ark. 865, 582 S.W.2d 3 (1979); *Jennings v. State*, 268 Ark. 216, 594 S.W.2d 855 (1980); *Banks v. State*, 277 Ark. 28, 639 S.W.2d 509 (1982); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

The words "forcibly ravish a female" meant that the act was "done against the will" of the female, or without her consent, which had the same meaning. *McDonald v. State*, 225 Ark. 38, 279 S.W.2d 44 (1955) (decision under prior law).

Testimony by victim held admissible on issue of whether defendant forced the victim to submit. *Fields v. State*, 235 Ark. 986, 363 S.W.2d 905 (1963) (decision under prior law).

Failure of victim to cry out, when attacked at gunpoint, held not to indicate consent. *Barton v. State*, 256 Ark. 486, 508 S.W.2d 554 (1974) (decision under prior law).

Evidence of forcible compulsion held insufficient to support defendant's conviction of rape. *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977).

Where victim was unconscious, giving instruction on rape where the victim was "incapable of consent because he is physically helpless" held not abuse of court's discretion. *Hair v. State*, 266 Ark. 583, 587 S.W.2d 34 (1979).

Victim's fear of being killed or beaten up if he resisted, is not sufficient to show forcible compulsion in the absence of evidence that defendant ever threatened him before he committed a sex act with him, since subjective feelings of fear of physical injury by the victim must be based on some act of the accused that can be reasonably interpreted to warrant such fear.

Mills v. State, 270 Ark. 141, 603 S.W.2d 416 (1980).

Where, after defendant performed an act of sex with the victim, defendant threatened to "kick his butt" if he told anyone, such conduct would not support conviction of rape, as it followed rather than preceded the deviate sexual activity. *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980).

Evidence held sufficient to find consensual sexual activity and not an act carried out by forcible compulsion. *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980).

Where the record indicated that defendant neither threatened nor employed physical force against victim, and allowed him to leave the motel room after rejecting defendant's advances, there was insufficient evidence to support the conviction for attempted rape. *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980).

The state proved the required element of force, where the victim blacked out and did not regain consciousness until the act of intercourse was in progress; the victim had resisted to the extent of her ability and lapse into unconsciousness could not be said to have amounted to consent. *Thomas v. State*, 289 Ark. 72, 709 S.W.2d 83 (1986).

Where both victims were children and they were alone every day after school with the defendant, who was their mother's brother and the only adult male living in the house, the jury was justified in finding that their submission was induced through the forcible coercion of the defendant, who stood in loco parentis to the girls. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986).

Where the 13-year-old victim testified that she asked the defendant not to have intercourse with her and that it upset her when he did and the 10-year-old victim testified the defendant told her to "do it or else," there was sufficient proof for the jury to find the acts were consummated against the will of the girls. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986).

"Forcible compulsion" under the rape statute is defined as "physical force," which is further defined as any bodily impact, restraint or confinement, or the threat thereof. *Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991); *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992).

The requirements of forcible compulsion, that the victim experience "bodily impact, restraint or confinement, or the threat thereof," were sufficiently shown to prove that element of rape under subdivision (a)(1) of this section. *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994).

The test for determining whether there was force is whether the act was against the will of the party upon whom the act was committed. *Mosley v. State*, 323 Ark. 244, 914 S.W.2d 731 (1996).

Evidence of forcible compulsion held sufficient where victim testified that defendant inflicted two bruises on her upper arms and the examining physician's testimony supported this testimony. *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998).

Indictment or Information.

No averment of sex was necessary in an indictment for rape. *Warner v. State*, 54 Ark. 660, 17 S.W. 6 (1891) (decision under prior law).

Indictment held sufficient. *Downs v. State*, 60 Ark. 521, 31 S.W. 149 (1895); *Beard v. State*, 79 Ark. 293, 95 S.W. 995 (1906), appeal dismissed, 207 U.S. 601, 28 S. Ct. 258, 52 L. Ed. 359 (1907) (preceding decisions under prior law).

An indictment for rape was not required to allege that the act complained of was unlawful. *Cabe v. State*, 182 Ark. 49, 30 S.W.2d 855 (1930) (decision under prior law).

There is only one crime of rape under the statutory law of the State of Arkansas, which can be committed either by sexual intercourse or by deviate sexual activity; therefore, an alternative or disjunctive charging of the crime of rape by either sexual intercourse or deviate sexual activity is adequate, proper, and sufficient notice to the defendant so charged. *Bliss v. State*, 288 Ark. 546, 708 S.W.2d 74 (1986).

Information charging defendant alternatively with counts of rape by deviate sexual activity by either forcible compulsion, or upon one who is incapable of consent because he is physically helpless, was proper. *Logan v. State*, 299 Ark. 266, 773 S.W.2d 413 (1989).

The decision of what charge is to be filed rests with the prosecutor, and the fact that the prosecutor chose to file a Class Y felony against defendant for the rape of his daughter, which carries with it a

higher penalty than incest, did not, by itself, give rise to a constitutional infringement. *Simpson v. State*, 310 Ark. 493, 837 S.W.2d 475 (1992).

The trial court was correct in allowing the state to amend the information from rape by deviate sexual activity to rape by sexual intercourse, since the amendment did not change the nature or degree of the crime. *Midgett v. State*, 316 Ark. 553, 873 S.W.2d 165 (1994).

Information held sufficient notwithstanding that it omitted culpable mental state from the statutory elements of the crime. *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997).

Instructions.

Instruction given held proper. *Whittaker v. Kirchman*, 171 Ark. 1029, 287 S.W. 168 (1926) (decision under prior law).

Giving a cautionary instruction held proper, however, the giving of such an instruction rested in the sound discretion of the trial court. *Bradshaw v. State*, 211 Ark. 189, 199 S.W.2d 747 (1947) (decision under prior law).

The refusal of the trial court to give a cautionary instruction held not to call for reversal. *Williams v. State*, 254 Ark. 940, 497 S.W.2d 11 (1973) (decision under prior law).

Since there is only one crime of rape with two possible means of commission, either by sexual intercourse or deviate sexual activity, the defendant was not prejudiced by the jury being instructed as to the two sexual acts that could be committed to constitute rape where there was substantial evidence of both acts. *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986), cert. denied, 479 U.S. 856, 107 S. Ct. 195, 93 L. Ed. 2d 127 (1986).

Where, in prosecution for rape of his daughter, the defendant's defense was one of complete innocence and that nothing improper occurred between him and his daughter, he was not entitled to jury instructions on the lesser included offenses of carnal abuse in the third degree and sexual misconduct. *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986).

There is no rational basis for a lesser included instruction when a defendant charged with rape under this section denies entirely any sexual encounter with the purported victim. *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992).

Since "serious physical injury" is not an element of the crime of rape, the circuit court correctly refused the defendant's proffered modified version of AMCI 1803. *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993).

Jurisdiction.

It is not essential to a prosecution in this state that all the elements of the crime charged take place in Arkansas; rather if the requisite elements of the crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction, and since carnal knowledge of the victim is an essential element of the crime of rape by sexual intercourse if it occurs in Arkansas, this state has jurisdiction. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

Evidence held sufficient to support the jury's finding that the rape had occurred in Arkansas. *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

Rape is a violent offense, and such a charge is sufficient to meet the requirements set out in § 9-27-318(e)(1) for denial of transfer to juvenile court. *Slay v. State*, 309 Ark. 507, 832 S.W.2d 217 (1992).

Lesser Included Offenses.

An indictment for rape would support a conviction for carnal abuse. *Henson v. State*, 76 Ark. 267, 88 S.W. 965 (1905); *Willis v. State*, 221 Ark. 162, 252 S.W.2d 618 (1952) (preceding decisions under prior law).

An indictment for rape would support a conviction for assault with intent to rape. *Green v. State*, 91 Ark. 562, 121 S.W. 949 (1909); *Crawford v. State*, 132 Ark. 518, 201 S.W. 784 (1918); *Lindsey v. State*, 213 Ark. 136, 209 S.W.2d 462 (1948) (preceding decisions under prior law).

The court could correctly instruct the jury as to the lesser offense of assault with intent to rape, in view of the rule that a defendant indicted for rape could be convicted of assault with intent to rape. *Bradshaw v. State*, 211 Ark. 189, 199 S.W.2d 747 (1947) (decision under prior law).

Where on a charge of rape there was

evidence tending to show both rape and attempted rape and that physical force used was for the purpose of satisfying sexual desires, the court was not required to instruct that crime of assault and battery could not be established unless intent to inflict an injury was shown, as statutory definition of assault and battery did not contain the word intent. *Bailey v. State*, 215 Ark. 53, 219 S.W.2d 424 (1949) (decision under prior law).

Refusal to instruct on the lesser charge held proper. *Bailey v. State*, 227 Ark. 889, 302 S.W.2d 796, cert. denied, 355 U.S. 851, 78 S. Ct. 77, 2 L. Ed. 2d 59 (1957) (decision under prior law); *Hair v. State*, 266 Ark. 583, 587 S.W.2d 34 (1979); *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

Where the proof of two rape charges was deficient in regard to forcible compulsion, both rape convictions were reduced to convictions of carnal abuse in the third degree and the sentences reduced accordingly. *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980).

None of the crimes of rape, burglary or kidnapping is necessarily a lesser included offense of the other. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Handy v. State*, 24 Ark. App. 122, 749 S.W.2d 683 (1988).

Public sexual indecency is not a lesser included offense of rape because the two offenses each contain an element that the other does not. *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Sexual abuse in the first degree is a lesser included offense of attempted rape. *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986).

Rape and first degree battery are separate and distinct crimes with different elements of proof. And neither is a crime which can be subsumed under the other. *Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991).

Carnal abuse is not a lesser included offense of rape; the lesser included offense is sexual abuse. *Langley v. State*, 315 Ark. 472, 868 S.W.2d 81 (1994).

First-degree sexual abuse as defined in § 5-14-108(a)(3) is not a lesser included offense of rape pursuant to subdivision

(a)(3) of this section, because it contains an element (age of the perpetrator) not found in the rape provision. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996).

Trial court was not required to instruct a jury on the offense of carnal abuse in the third degree (former § 5-14-106) because it was not a lesser-included offense of rape; carnal abuse in the third degree contained elements not found in subdivision (a)(4) of this section and carnal abuse in the third degree differed from rape in more ways than just the seriousness of harm inflicted upon a victim. *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

Court did not err in refusing to instruct the jury on sexual indecency with a child where it was not a lesser included offense of rape because committing the crime of sexual indecency with a child was not an attempt to commit rape, and the injury or risk of injury was the same for both offenses; specifically, subjecting the victim to deviate sexual activity was the injury or risk of injury for both offenses. *Pratt v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 537 (Sept. 30, 2004).

Penetration.

The carnal knowlege that was required to constitute rape was res in re but to no particular depth and the hymen need not be ruptured nor the body torn. *Poe v. State*, 95 Ark. 172, 129 S.W. 292 (1910); *Cabe v. State*, 182 Ark. 49, 30 S.W.2d 855 (1930); *McDonald v. State*, 225 Ark. 38, 279 S.W.2d 44 (1955) (preceding decisions under prior law).

Proof of penetration was necessary to sustain a conviction but penetration could be proved by circumstantial evidence, provided the inferences to be deduced from circumstances proved left no reasonable doubt. *Hudspeth v. State*, 194 Ark. 576, 108 S.W.2d 1085 (1937).

Where a qualified doctor obtained a smear from the mouth of the victim's womb and found living spermatozoa of the male sperm cells in the secretion, the requirements for conviction for the offense of rape were met by the evidence. *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963) (decision under prior law).

Evidence regarding penetration held sufficient to support conviction. *Scott v. State*, 254 Ark. 271, 492 S.W.2d 902 (1973); *Hice v. State*, 268 Ark. 57, 593

S.W.2d 169 (1980); *Harris v. State*, 9 Ark. App. 253, 657 S.W.2d 566 (1983); *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992).

Penetration in a rape or sodomy case can be shown by circumstantial evidence. *Whitmore v. State*, 263 Ark. 419, 565 S.W.2d 133 (1978).

By defining "sexual intercourse," which is included within the definition of rape, as "penetration, however slight, of a vagina by a penis," the draftsmen of the 1975 Criminal Code did not intend to change the crime of rape by requiring a deeper penetration into the body than penetration of the labia, as was formerly necessary; therefore, penetration within the labia up to as far as the hymen, was sufficient to sustain the defendant's conviction. *Hice v. State*, 268 Ark. 57, 593 S.W.2d 169 (1980).

Penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient. *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986).

A rational juror could reasonably conclude that putting the mouth on the penis constitutes penetration. *Chambers v. Lockhart*, 872 F.2d 274 (8th Cir.), cert. denied, 493 U.S. 938, 110 S. Ct. 335, 107 L. Ed. 2d 324 (1989).

Both deviate sexual activity and sexual intercourse require penetration "however slight." *D.D. v. State*, 40 Ark. App. 75, 842 S.W.2d 62 (1992).

Nine-year-old victim's testimony that defendant put his penis inside her body, along with her description of defendant's acts, was substantial evidence of penetration, and was sufficient, standing alone, absent any corroboration, to sustain defendant's conviction for rape. *United S. Assurance Co. v. Beard*, 320 Ark. 115, 894 S.W.2d 948 (1995).

Evidence of penetration held sufficient, even though the attacker did not have an erection, where victim testified that he "smushed it in." *Stewart v. State*, 331 Ark. 359, 961 S.W.2d 750 (1998).

Physically Helpless.

Subdivision (a)(2) only requires physical helplessness, not total incapacity.

Where the victim's physical condition

made it impossible for her to be "aware" of defendant's intentions before he actually commenced the rape, it is likely that the victim was unaware of what was about to occur and of her need to indicate her lack of consent; under these circumstances, the victim was unable to consent due to her physical helplessness. *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1996).

Sentencing.

The reclassification of rape to a Class Y felony from a Class A felony was a substantive change in the law and that those charged with rape after the effective date of the amendment should be tried under the substantive law in effect when the crime was committed. *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982); *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985).

Since § 5-4-104(c) provides that defendant convicted of a Class Y felony must be sentenced to imprisonment, a defendant convicted of deviate sexual activity could not be given a suspended sentence or probation even where the prosecutor agreed that some form of probation would be proper. *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

Where the judge imposed a net sentence of 35 years when he could well have imposed a life sentence and he spoke at some length about the crime and the fact that it exceeded anything he had seen while serving on the bench, his words, (that if it had been his child, there would be no sentencing hearing), were intended in a figurative sense and there was no prejudice. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

Where the defendant was originally sentenced to 50 years with 15 years suspended for a Class Y felony, the trial judge was right to modify the sentence to 35 years, but the defendant was not entitled to the 15 years suspended under the original sentence. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

There was no error in court's imposition of life sentence where defendant was convicted of rape, a Class Y felony, and with a record of four prior felonies, the range of his punishment was 40 years to life imprisonment. *Henderson v. State*, 310 Ark. 287, 835 S.W.2d 865 (1992).

The penalty for rape is the same whether it is by deviate sexual activity or

by sexual intercourse. *Midgett v. State*, 316 Ark. 553, 873 S.W.2d 165 (1994).

Separate Offenses.

Prosecution in the justice of the peace court for assault and disturbing the public peace could not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Where there was ample testimony by which the jury could have found that the defendant father committed rape by deviate sexual activity on one occasion and, on other occasions, was guilty of incest by having sexual intercourse with his 14-year-old daughter, each act constituted a separate offense, and the defendant was properly convicted on separate counts of rape and incest. *Massey v. State*, 278 Ark. 625, 648 S.W.2d 52 (1983).

A forcible act of intercourse with one's child under the age of 11 would support a conviction for rape or incest, but not both, and neither is a lesser included offense of the other, though several elements are the same. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Since defendant was convicted of rape and attempted first degree murder, and rape and attempted first degree murder are separate and distinct offenses and each requires proof of a fact which the other does not, the convictions for rape and attempted first degree murder did not violate the double jeopardy clause. *Wiman v. Lockhart*, 797 F.2d 666 (8th Cir.), cert. denied, 479 U.S. 1021, 107 S. Ct. 678, 93 L. Ed. 2d 728 (1986).

Kidnapping and rape are not lesser included offenses of one another because each crime requires a different element of proof. While kidnapping does require the restraint to be substantial for one of several purposes, one of which is the purpose of engaging in sexual intercourse, kidnapping does not require the act of sexual intercourse itself. Rape requires a sexual act by forcible compulsion; that force is not necessarily the same as that required to sustain a conviction for kidnapping. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

Where the defendant raped the victim with his finger, and then, after leaving the

bedroom and returning, got an erection and penetrated her, the two acts of rape were of a different nature and were separate in point of time, and the defendant was properly convicted of two counts of rape. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

Where the victim was forced to drive to the country where she was repeatedly raped, her life was threatened several times although she was not seriously injured physically, and after the rape the victim was tied to a tree, the crime of rape and kidnapping were separate. *Jones v. State*, 290 Ark. 113, 717 S.W.2d 200 (1986).

Being convicted of rape and kidnapping does not violate a defendant's right to be free from double jeopardy. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989).

There are different elements of proof between the offenses of third degree carnal abuse (§ 5-14-106) which requires that the accused be 20 years of age or above, and the crime of rape (§ 5-14-103) which has no such element. *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992).

Rape is not a continuing offense; rather, each act of rape is a separate offense. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

An offense such as rape necessarily contemplates restrictions on the victim's liberty while the crime is being committed; therefore, only when the restraint imposed exceeds that normally incidental to the underlying crime should the rapist also be subject to prosecution for kidnapping. *Wofford v. State*, 44 Ark. App. 94, 867 S.W.2d 181 (1993).

Where defendant was accused of committing five unconnected sexual assaults against five different girls, the alleged offenses occurred over a twelve-month period, involved different charges, and were committed in different manners, against different victims, and at different locations, the charges should not have been consolidated for trial; since these five crimes were of a similar character, but were not part of a single scheme or plan, the defendant had a right to a severance of the offenses. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994).

Defendant was properly charged with multiple counts of rape rather than one count where there were separate penetrations occurring as a result of separate

impulses, notwithstanding that the acts were not separated in time. *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997).

Because the carnal abuse statute requires proof of facts that the rape statute does not, the fact that a defendant is charged with both offenses does not violate double jeopardy. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Voluntary Intoxication.

Voluntary intoxication is not a defense to having sexual relations with minor children. *Drymon v. State*, 316 Ark. 799, 875 S.W.2d 73 (1994).

Cited: *Kitchen v. State*, 264 Ark. 579, 572 S.W.2d 839 (1978); *White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979); *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979); *Conley v. State*, 267 Ark. 713, 590 S.W.2d 66 (Ct. App. 1979); *Rogers v. Britton*, 466 F. Supp. 397 (E.D. Ark. 1979); *Rogers v. Britton*, 466 F. Supp. 397 (E.D. Ark. 1979); *Rogers v. Britton*, 476 F. Supp. 1036 (E.D. Ark. 1979); *Washington v. State*, 267 Ark. 1040, 594 S.W.2d 29 (Ct. App. 1980); *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980); *Harris v. State*, 268 Ark. 425, 597 S.W.2d 75 (1980); *Bailey v. State*, 269 Ark. 397, 601 S.W.2d 843 (1980); *Shepherd v. State*, 270 Ark. 457, 605 S.W.2d 414 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981); *Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981); *Robinson v. State*, 275 Ark. 473, 631 S.W.2d 294 (1982); *Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982); *Veasey v. State*, 276 Ark. 457, 637 S.W.2d 545 (1982); *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982); *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983); *Massey v. State*, 278 Ark. 625, 648 S.W.2d 52 (1983); *Keck v. American Emp. Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983); *McGee v. State*, 280 Ark. 347, 658 S.W.2d 376 (1983); *Scott v. State*, 284 Ark. 388, 681 S.W.2d 915 (1985); *Timmons v. State*, 286 Ark. 42, 688 S.W.2d 944 (1985); *McKinnon v. State*, 287 Ark. 1, 695 S.W.2d 826 (1985); *Hickey v. State*, 14 Ark. App. 50, 684 S.W.2d 830 (1985); *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985); *Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985); *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986); *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986); *Hughes v. State*,

292 Ark. 619, 732 S.W.2d 829 (1987); Foster v. State, 294 Ark. 146, 741 S.W.2d 251 (1987); Yates v. State, 301 Ark. 424, 785 S.W.2d 199 (1990); Cozad v. State, 303 Ark. 137, 792 S.W.2d 606 (1990); Leshe v. State, 304 Ark. 442, 803 S.W.2d 522 (1991); Dewitt v. State, 306 Ark. 559, 815 S.W.2d 942 (1991); Cole v. State, 307 Ark. 41, 818 S.W.2d 573 (1991); Swanson v. State, 308 Ark. 28, 823 S.W.2d 812 (1992); Terry v. State, 309 Ark. 64, 826 S.W.2d 817 (1992); Bonds v. State, 310 Ark. 541, 837 S.W.2d 881 (1992); Richardson v. State, 314 Ark. 512, 863 S.W.2d 572 (1993); Tolbert v. State, 316 Ark. 671, 874 S.W.2d 371 (1994); Evans v. State, 317 Ark. 449,

879 S.W.2d 409 (1994); Hagen v. State, 47 Ark. App. 137, 886 S.W.2d 889 (1994); Helton v. State, 320 Ark. 352, 896 S.W.2d 887 (1995); Parnell v. State, 323 Ark. 34, 912 S.W.2d 422 (1996); Hansen v. State, 323 Ark. 407, 914 S.W.2d 737 (1996); Hinzman v. State, 53 Ark. App. 256, 922 S.W.2d 725 (1996); Donihoo v. State, 325 Ark. 483, 931 S.W.2d 69 (1996); Chavis v. State, 328 Ark. 251, 942 S.W.2d 853 (1997); Sansevero v. State, 345 Ark. 307, 45 S.W.3d 840 (2001); Isom v. State, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

5-14-104. [Repealed.]

Publisher's Notes. This section, concerning carnal abuse in the first degree, was repealed by Acts 2001, No. 1738, § 6. The section was derived from Acts 1975, No. 280, § 1804; 1985, No. 281, § 3; 1985,

No. 870, § 2; 1985, No. 919, § 3; A.S.A. 1947, § 41-1804; Acts 1993, No. 935, § 2; 1995, No. 578, § 1.

For present law, see §§ 5-14-124 — 5-14-127.

5-14-105. [Repealed.]

Publisher's Notes. This section, concerning carnal abuse in the second degree, was repealed by Acts 2001, No. 1738, § 7. The section was derived from Acts 1975,

No. 280, § 1805; A.S.A. 1947, § 41-1805; Acts 1995, No. 1313, § 1.

For present law, see §§ 5-14-124 — 5-14-127.

5-14-106. [Repealed.]

Publisher's Notes. This section, concerning carnal abuse in the third degree, was repealed by Acts 2001, No. 1738, § 8. The section was derived from Acts 1975,

No. 280, § 1806; A.S.A. 1947, § 41-1806; Acts 1995, No. 1313, § 2.

For present law, see §§ 5-14-124 — 5-14-127.

5-14-107. [Repealed.]

Publisher's Notes. This section, concerning sexual misconduct, was repealed by Acts 2001, No. 1738, § 9. The section was derived from Acts 1975, No. 280,

§ 1807; A.S.A. 1947, § 41-1807; Acts 1997, No. 1037, § 1.

For present law, see §§ 5-14-124 — 5-14-127.

5-14-108. [Repealed.]

Publisher's Notes. This section, concerning sexual abuse in the first degree, was repealed by Acts 2001, No. 1738, § 10. The section was derived from Acts 1975, No. 280, § 1808; 1985, No. 281, § 4;

1985, No. 870, § 3; 1985, No. 919, § 4; A.S.A. 1947, § 41-1808; Acts 1993, No. 935, § 3; 1997, No. 831, § 2.

For present law, see §§ 5-14-124 — 5-14-127.

5-14-109. [Repealed.]

Publisher’s Notes. This section, concerning sexual abuse in the first degree, was repealed by Acts 2001, No. 1738, § 11. The section was derived from Acts 1975, No. 280, § 1809; A.S.A. 1947, § 41-1809; Acts 1993, No. 935, § 4; 995, No. 208, § 1; 1995, No. 294, § 1; 1997, No. 514, § 1; 2001, No. 545, § 2.
For present law, see §§ 5-14-124 — 5-14-127.

5-14-110. Sexual indecency with a child.

- (a) A person commits sexual indecency with a child if:
- (1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:
 - (A) Sexual intercourse;
 - (B) Deviate sexual activity; or
 - (C) Sexual contact;
 - (2)(A) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of any other person, the person purposely exposes his or her sex organs to another person who is less than fifteen (15) years of age.
 - (B) It is an affirmative defense to a prosecution under subdivision (a)(2)(A) of this section if the person is within three (3) years of age of the victim; or
 - (3) Being eighteen (18) years of age or older, the person causes or coerces another person who is less than fourteen (14) years of age to expose his or her sex organs or the breast of a female with the purpose to arouse or gratify a sexual desire of himself, herself, or another person.
- (b) Sexual indecency with a child is a Class D felony.

History. Acts 1975, No. 280, § 1810; A.S.A. 1947, § 41-1810; Acts 1995, No. 550, § 1; 2001, No. 1821, § 1; 2005, No. 1993, § 1.
The 2005 amendment substituted “of age” for “old” in (a)(1); inserted “to prosecution under subdivision (a)(2)(A) of this section” in (a)(2)(B); and added (a)(3).

Amendments. The 2001 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS	Mental state.
Construction.	Construction.
Evidence.	Gravamen of the offense set out in subsection (a) of this section is the induce-
Lesser included offenses.	

ment of a child to engage in a sexual act; subsection (a) should not be read so narrowly as to require that inducement be expressed verbally where there is evidence of unambiguous nonverbal inducement. *Renderos v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 605 (Sept. 14, 2005).

Evidence.

Evidence was sufficient for a conviction of committing sexual indecency with a child where defendant offered a 14 year old girl money in exchange for sex, she understood that he had meant sexual intercourse and that he was serious, and his request amounted to solicitation. *Heape v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 631 (Sept. 22, 2004).

Defendant's conviction for sexual indecency with a child, in violation of subdivision (a)(1) of this section, was upheld as a finder of fact could reasonably have concluded that the act of forcibly and persistently pulling a girl's pants down against her wishes while alone with her in a garage attic was unmistakably importuning her to commit sexual indecency. *Renderos v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 605 (Sept. 14, 2005).

Lesser Included Offenses.

Court did not err in refusing to instruct the jury on sexual indecency with a child where it was not a lesser included offense of rape because committing the crime of sexual indecency with a child was not an attempt to commit rape, and the injury or risk of injury was the same for both offenses; specifically, subjecting the victim to deviate sexual activity was the injury or risk of injury for both offenses. *Pratt v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 537 (Sept. 30, 2004).

Mental State.

Appellate court found no merit in defendant's argument that he was merely rhetorically questioning a 14-year-old girl about sex, rather than soliciting her, and that he had no intent to make such a statement where there was testimony that he offered to pay money in exchange for sex, that he offered her more money after she refused him, and that he kissed her on the neck after encouraging the young boys in her charge to kiss her. *Heape v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 631 (Sept. 22, 2004).

Cited: *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994).

5-14-111. Public sexual indecency.

(a) A person commits public sexual indecency if he or she engages in any of the following acts in a public place or public view:

- (1) An act of sexual intercourse;
- (2) An act of deviate sexual activity; or
- (3) An act of sexual contact.

(b) Public sexual indecency is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1811; A.S.A. 1947, § 41-1811.

RESEARCH REFERENCES

ALR. What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 ALR 5th 229.

UALR L.J. Arkansas Law Survey, Jeffrey, Nelson, Nunnally and Robertson, Constitutional Law, 7 UALR L.J. 179.

5-14-112. Indecent exposure.

(a) A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs:

- (1) In a public place or in public view; or
 - (2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.
- (b) Indecent exposure is a Class A misdemeanor.

History. Acts 1975, No. 280, § 1812; A.S.A. 1947, § 41-1812; Acts 1997, No. 817, § 1; 2001, No. 1553, § 7; 2001, No. 1665, § 1; 2001, No. 1821, § 2; 2003, No. 862, § 1; 2005, No. 1815, § 1; 2005, No. 1962, § 5.

A.C.R.C. Notes. This section was also amended by Acts 2005, No. 1962, § 5. However, pursuant to Acts 2005, No. 1962, § 119, this section is set out as amended by Acts 2005, No. 1815, § 1.

Amendments. The 2001 amendment by No. 1553 made minor stylistic changes.

The 2001 amendment by No. 1665 added (a)(3); substituted “person under the age of twelve (12) years is” for “person the age of twelve (12) years and under is” in (b)(2); and made gender neutral changes throughout.

The 2001 amendment by No. 1821 re-designated former (a)(1) as the present introductory language of (a); redesignated former (a)(1)(A) and (a)(1)(B) as present (a)(1) and (a)(2); deleted former (b); redesignated former (a)(2) as present (b)(1); added (b)(2); and made gender neutral changes throughout.

The 2003 amendment made stylistic changes in (a); and deleted “but greater than eleven (11) years” following “fifteen (15) years” twice in (B)(2)(A).

The 2005 amendment by No. 1815 re-designated former (b)(1) as present (b); and deleted former (b)(2).

Cross References. Exposing private parts as disorderly conduct, § 5-71-207.

Nudism, § 5-68-204.

RESEARCH REFERENCES

ALR. What constitutes “public place” within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 ALR 5th 229.

Ark. L. Rev. Disorderly Conduct and Loitering — A Modern Approach to Traditional Legislation, 30 Ark. L. Rev. 186.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Indecent Exposure, 26 UALR L.J. 363.

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Arousal or gratification of sexual desire.
Evidence.
Lesser included offenses.
Public place.

Constitutionality.

Former section concerning indecent exposure did not unconstitutionally discriminate against female dancers arrested for appearing nude from the waist up on

nightclub stage because of their sex, in that males who appear in public bare from the waist up have never been prosecuted for such conduct, there being nothing to indicate that under proper facts and circumstances a male person would be immune to prosecution for indecent exposure. *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973) (decision under prior law).

Former section concerning indecent exposure was not unconstitutional, as applied to female appellants arrested for

dancing naked from the waist up on stage of nightclub, on ground that it contained no provision for judicially superintended adversary proceedings with due notice and trial by jury to determine what was and what was not obscene. *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973) (decision under prior law).

Where a male defendant was convicted of sodomy under § 5-14-122 for engaging in oral sex with another male in a restroom in a public park, the conviction did not violate the defendant's constitutional right to privacy since the defendant had no privacy right to perform such acts in public, and the application of § 5-14-122 to public sexual activity between two members of the same sex did not violate the equal protection rights of homosexuals, because a heterosexual couple engaging in the same act would be guilty of public sexual indecency under this section, and would be subject to the exact same penalty. *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983).

Applicability.

This section applies not only to flashers but also to nude dancing in a public tavern. *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986).

Arousal or Gratification of Sexual Desire.

Evidence held sufficient to find that the trial court was warranted in finding that lascivious intent was established. *Burton v. State*, 253 Ark. 312, 485 S.W.2d 750 (1972) (decision under prior law).

Evidence held sufficient to find that defendant was dancing to arouse or gratify the sexual desires of herself or others. *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986).

Evidence.

Evidence held sufficient to sustain conviction. *Anderson v. City of El Dorado*, 243

Ark. 137, 418 S.W.2d 801 (1967) (decision under prior law).

Where intent was an integral part of former section concerning indecent exposure, it was proper to admit testimony of similar or related unnatural sex acts to establish habit or practice related to intent. *Fields v. State*, 255 Ark. 540, 502 S.W.2d 480 (1973) (decision under prior law).

Court properly denied the motion to introduce evidence of the victim's prior sexual conduct. *Farrell v. State*, 269 Ark. 361, 601 S.W.2d 835 (1980).

Lesser Included Offenses.

Public sexual indecency is not a lesser included offense of rape because the two offenses each contain an element that the other does not; rape requires proof of forcible compulsion, while public sexual indecency requires proof that the activity occurred in a public place or in the public view. *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Sexual abuse requires proof of a touching, and indecent exposure requires proof of exposure; therefore, the two crimes do not meet the statutory definition of a lesser included offense. *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985).

Public Place.

Drunk tank of the city jail was a public place. *State v. Black*, 260 Ark. 864, 545 S.W.2d 617 (1977).

The definition of a "public place" does not exclude establishments that limit their fare only to consenting adults and forewarned viewers. *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985), cert. denied, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986).

Cited: *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982); *Virden v. State*, 297 Ark. 507, 764 S.W.2d 43 (1989).

5-14-113 — 5-14-119. [Reserved.]

5-14-120. [Repealed.]

Publisher's Notes. This section, concerning violation of a minor in the first degree, was repealed by Acts 2001, No.

1738, § 12. The section was derived from Acts 1985, No. 326, § 1; A.S.A. 1947, § 41-1826; Acts 1993, No. 265, § 1.

5-14-121. [Repealed.]

Publisher's Notes. This section, concerning violation of a minor in the second degree, was repealed by Acts 2001, No.

1738, § 13. The section was derived from Acts 1985, No. 326, § 2; A.S.A. 1947, § 41-1827; Acts 1993, No. 265, § 2.

5-14-122. Bestiality.

(a) As used in this section, "animal" means any dead or alive nonhuman vertebrate.

(b) A person commits bestiality if he or she performs or submits to any act of sexual gratification with an animal involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(c) Bestiality is a Class A misdemeanor.

History. Acts 1977, No. 828, § 1; A.S.A. 1947, § 41-1813; Acts 2005, No. 1994, § 496.

Amendments. The 2005 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Barrier, *Render Unto Caesar: An Essay on Private Morals and Public Law*, 4 UALR L.J. 511.

Arkansas Law Survey, Jeffrey, Nelson, Nunnally and Robertson, *Constitutional Law*, 7 UALR L.J. 179.

Note: *Constitutional Law-Privacy and Equal Protection-Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Estab-*

lishing New Protections for Arkansas Gays and Lesbians, Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002), 25 UALR L.J. 681.

Comment, *Arkansas's Entry into the Not-So-New Judicial Federalism*, 25 UALR L.J. 835.

Annual Survey of Caselaw, *Constitutional Law*, 25 UALR L.J. 905.

CASE NOTES

ANALYSIS

Constitutionality.

Evidence.

Force.

Separate offenses.

Constitutionality.

Former statute providing penalty for sodomy was not too vague and too broad in scope, nor did it establish a religion because it regulated acts regarded as sinful by some religious groups. *Connor v. State*, 253 Ark. 854, 490 S.W.2d 114 (1973), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 2d 230 (1973) (decision under prior law).

Enforcement as to defendant of former statute providing penalty for sodomy did not violate any constitutional right of privacy where act was not committed in privacy but in an automobile on a public road adjacent to an interstate highway.

Connor v. State, 253 Ark. 854, 490 S.W.2d 114 (1973), appeal dismissed, 414 U.S. 991, 94 S. Ct. 342, 38 L. Ed. 2d 230 (1973) (decision under prior law).

Former section which provided penalty for sodomy when applied to convict two consenting adults of sodomy did not constitute a violation of defendants' rights to privacy or rights under either federal or state constitutions. *Carter v. State*, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905, 94 S. Ct. 1610, 40 L. Ed. 2d 110 (1974) (decision under prior law).

Statute which clearly prohibited "sodomy" and "buggery" was not subject to constitutional attack on the grounds of vagueness, even though the statute did not specifically name fellatio, since the conduct for which defendant was convicted had long been held to be prohibited and defendant was placed on notice that

his behavior was illegal. *Connor v. Hutto*, 516 F.2d 853 (8th Cir. 1975), cert. denied, 423 U.S. 929, 96 S. Ct. 278, 46 L. Ed. 2d 257 (1975) (decision under prior law).

Where a male defendant was convicted of sodomy under this section for engaging in oral sex with another male in a restroom in a public park, the conviction did not violate the defendant's constitutional right to privacy since the defendant had no privacy right to perform such acts in public. *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983).

Application of this section to public sexual activity between two members of the same sex did not violate the equal protection rights of homosexuals, because a heterosexual couple engaging in the same act would be guilty of public sexual indecency under § 5-14-111, and would be subject to the exact same penalty. *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983).

As circuit courts have exclusive jurisdiction over criminal prosecutions, an action seeking a declaration that the criminal sodomy statute is unconstitutional could only be heard in the circuit court. *Bryant v. Picado*, 338 Ark. 227, 996 S.W.2d 17 (1999) (decision under prior law).

This section is unconstitutional as applied to private, consensual, noncommercial, same-sex sodomy in that it infringes upon the fundamental right to privacy implicit in the Arkansas Constitution. *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) (decision under prior law).

This section is unconstitutional as applied to private, consensual, noncommercial, same sex sodomy in that it impermissibly criminalized conduct solely on the basis of the sex of the participants in violation of Arkansas's Equal Rights Amendment, Ark. Const., Art. 2, § 8.

Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002) (decision under prior law).

Evidence.

Where statute in a prosecution for sodomy required proof of actual penetration to sustain the charge, proof of the boy's injured condition was admissible to establish penetration. *Havens v. State*, 217 Ark. 153, 228 S.W.2d 1003 (1950) (decision under prior law).

Since the crime of sodomy could be proven by circumstantial evidence, no higher degree of evidence was required in corroborating the testimony of an accomplice than was required for conviction. *Burford v. State*, 242 Ark. 377, 413 S.W.2d 670 (1967) (decision under prior law).

Force.

Where defendant argued that since the jury found the codefendant guilty of sodomy, a crime which does not require force, and since the codefendant was the one who committed the sexual acts, a finding that defendant used force to commit a sexual act was an inconsistent verdict, the jury could have found that defendant was the more culpable of the two defendants where he was the one who actually used a knife to force the victim to submit to the sexual acts. *Young v. State*, 296 Ark. 394, 757 S.W.2d 544 (1988).

Separate Offenses.

Prosecution in the justice of the peace court for assault and disturbing the public peace could not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

5-14-123. Exposing another person to human immunodeficiency virus.

(a) A person with acquired immunodeficiency syndrome or who tests positive for the presence of human immunodeficiency virus antigen or antibodies is infectious to another person through the exchange of a body fluid during sexual intercourse and through the parenteral transfer of blood or a blood product and under these circumstances is a danger to the public.

(b) A person commits the offense of exposing another person to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person

to human immunodeficiency virus infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another person without first having informed the other person of the presence of human immunodeficiency virus.

(c)(1) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into a genital or anal opening of another person’s body.

(2) However, emission of semen is not required.

(d) Exposing another person to human immunodeficiency virus is a Class A felony.

History. Acts 1989, No. 614, §§ 1, 2. 614, § 1, is also codified as §§ 20-15-614, § 1, is also codified as §§ 20-15-904(a) and 16-82-101(a).
Publisher’s Notes. Acts 1989, No.

RESEARCH REFERENCES

Ark. L. Notes. Closen, The Arkansas Criminal HIV Exposure Law: Statutory Issues, Public Policy Concerns, and Constitutional Objections, 1993 Ark. L. Notes 47.

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS

Virus: Possibilities in Arkansas’ Future, 45 Ark. L. Rev. 505.

Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws, 46 Ark. L. Rev. 921.

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

CASE NOTES

Evidence.

The trial court properly refused to allow the defendant to ask questions concerning the victim’s past sexual encounters where the defendant did not proffer evidence that the suspected sexual partners had

the virus or that the victim contracted the virus by anything other than the relationship she had with the defendant. *Weaver v. State*, 56 Ark. App. 104, 939 S.W.2d 316 (1997).

5-14-124. Sexual assault in the first degree.

(a) A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity with another person who is less than eighteen (18) years of age and is not the actor’s spouse and the actor is:

(1) Employed with the Department of Correction, the Department of Community Correction, the Department of Health and Human Services, or any city or county jail or a juvenile detention facility, and the victim is in the custody of the Department of Correction, the Department of Community Correction, the Department of Health and Human Services, any city or county jail or juvenile detention facility, or their contractors or agents;

(2) A professional under § 12-12-507(b) and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(3) An employee in the victim’s school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) It is an affirmative defense to a prosecution under subdivision (a)(3) of this section that the actor was not more than three (3) years older than the victim.

(d) Sexual assault in the first degree is a Class A felony.

History. Acts 2001, No. 1738, § 2; 2003, No. 1391, § 1; 2003, No. 1469, § 2.

Amendments. The 2003 amendment by No. 1391 inserted “subdivision (a)(3) of” in (c).

The 2003 amendment by No. 1469 substituted “actor” for “person” in (a) and (c); and deleted “the victim’s guardian” following “Is” in (a)(3).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Construction with other law.
Enhancement of sentence.
Illustrative cases.

Construction With Other Law.

Compared to subsection (a)(3) of this section, there is no language in the rape statute, § 5-14-103, regarding the terms, “temporary caretaker” or “person in a position of trust or authority,” and the State’s proof is not the same. *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003).

Enhancement of Sentence.

Defendant’s prior conviction for first-degree sexual abuse related to child exploitation and, thus, triggered the enhanced statutory minimum sentence of 15 years pursuant to the version of 18 U.S.C.S. § 2251(d) in effect at the time of defendant’s conviction in 2003 because,

even though the term “sexual exploitation of children” was not defined in § 2251, the term unambiguously referred to any criminal sexual conduct with a child; the conduct did not have to be photographed to qualify for enhancement. *United States v. Smith*, 367 F.3d 748 (8th Cir. 2004).

Illustrative Cases.

Homosexual defendants asserted they were simply social friends of the victim and could not be convicted under the “catch-all” language of former subsection (c) because they were not “temporary caretakers” or “in a position of trust or authority,” however, where defendants gave victim’s parents assurances they would look after the victim and not engage in any homosexual activity with him, the jury properly determined defendants were in a position of trust or authority. *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003).

5-14-125. Sexual assault in the second degree.

(a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:

(A) Less than fourteen (14) years of age; and

(B) Not the person's spouse;

(4)(A) Engages in sexual contact with another person who is less than eighteen (18) years of age and the actor is:

(i) Employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(ii) A professional under § 12-12-507(b) and is in a position of trust or authority over the minor; or

(iii) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to a prosecution;

(5)(A) Being less than eighteen (18) years of age, engages in sexual contact with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse.

(B) It is an affirmative defense to a prosecution under this subdivision (a)(5) that the actor was not more than:

(i) Three (3) years older than the victim if the victim is less than twelve (12) years of age; or

(ii) Four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher* in a public school in a grade kindergarten through twelve (K-12) and engages in sexual contact with another person who is:

(A) A student enrolled in the public school; and

(B) Less than twenty-one (21) years of age.

(b)(1) Sexual assault in the second degree is a Class B felony.

(2) Sexual assault in the second degree is a Class D felony if committed by a person less than eighteen (18) years of age with another person who is:

(A) Less than fourteen (14) years of age; and

(B) Not the person's spouse.

History. Acts 2001, No. 1738, § 3; 2003, No. 1323, § 1; 2003, No. 1720, § 2.

A.C.R.C. Notes. Pursuant to § 1-2-303, the internal reference in subdivision (a)(5)(B) has been corrected to read "this subdivision (a)(5)". An apparent engrossment error in House Bill 1935 of 2003, subsequently enacted as Acts 2003, No. 1323, changed the internal reference from

"this subdivision (a)(5)" to "this section".

Amendments. The 2003 amendment by No. 1323 deleted "the sex organs of" preceding "another" in (a)(1) and (a)(3); deleted "of genitalia" following "contact" in (a)(2); substituted "Correction" for "Punishment" in (a)(4)(A)(i); substituted "and" for "or" in (a)(4)(A)(ii); in (a)(4)(A)(iii), deleted "or" following "district" and added

“or a person in a position of trust or authority over the minor”; added (a)(5) and (b)(2); and made stylistic changes.

The 2003 amendment by No. 1720 added (a)(6).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Sexual Offenses, 26 UALR L.J. 372.

CASE NOTES

ANALYSIS

Constitutionality.

Age of victim.

—Appellate review.

Applicability.

Evidence.

Constitutionality.

Defendant did not meet his burden of proving that this section was void for vagueness because he admitted to molesting the victim, his actions toward the victim fell within the conduct proscribed by this section and, under the plain meaning of the term, “temporary caretaker,” defendant was given sufficient warning under the language of the statute of the prohibited conduct, particularly because he was an adult in charge of the victim’s care when he sexually assaulted her. *Bowker v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 556 (Sept. 29, 2005).

Age of Victim.

—Appellate Review.

Defendant preserved a sufficiency of the evidence argument for the lesser-included offense of sexual assault in the second degree when an argument was raised to challenge the state’s case based on a failure to show forcible compulsion; the original charge was attempted rape. *Davis v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 240 (Apr. 21, 2005).

Where defendant was convicted of first-degree sexual abuse under § 5-14-108(a)(4) (repealed) for sexually assaulting a child under the age of 14, knowledge, or even a reasonable belief of the victim’s age, was eliminated as a defense by § 5-14-102(b); accordingly, the state was not required to prove defendant’s knowledge of the victim’s age. *Short v. State*, 349 Ark. 492, 79 S.W.3d 313 (2002).

Defendant’s conviction as an accomplice

to one count of second-degree sexual assault was proper as there was no doubt that defendant was aware that two men who had resided with her raped and assaulted her daughter at various times when the girl was between eight or nine and 15 years of age, yet defendant concealed her knowledge of the acts and failed to protect her daughter. *Hutcheson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 608 (Sept. 14, 2005).

Applicability.

Defendant was convicted under § 5-14-125 for second-degree sexual assault, which was not in effect at the time his crime was committed, after he was found guilty under a repealed statute for first-degree sexual assault, former § 5-14-108, which the appellate court found was prejudicial to him and a violation of due process because the statutes did not proscribe the same conduct. *Cousins v. State*, 82 Ark. App. 84, 112 S.W.3d 373 (2003).

Evidence.

Where victim testified that defendant stopped her as she was leaving church, persuaded her to return to the church to retrieve an item, and tried to rape her, there was sufficient evidence to support a conviction under this section; moreover, there was testimony from other church members that defendant was acting strangely prior to the attack. *Davis v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 240 (Apr. 21, 2005).

Trial court correctly denied defendant’s motion for a directed verdict on the charges of rape and first-degree violation of a minor where the evidence clearly demonstrated that defendant occupied a position of trust or authority over the victim during the time that he lived with her and her mother; defendant had repeatedly disciplined the victim and she considered him to be her father. *Martin v.*

State, 354 Ark. 289, 119 S.W.3d 504 (2003).

Evidence was sufficient to sustain a second-degree sexual assault conviction where defendant digitally penetrated the

15 year old victim while the victim was entrusted to defendant's care. *Bowker v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 556 (Sept. 29, 2005).

5-14-126. Sexual assault in the third degree.

(a) A person commits sexual assault in the third degree if the person:

(1) Engages in sexual intercourse or deviate sexual activity with another person who is not the actor's spouse, and the actor is:

(A) Employed with the Department of Correction, Department of Community Correction, Department of Health and Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Health and Human Services, or any city or county jail;
or

(B) A professional under § 12-12-507(b) or a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(2)(A) Being under eighteen (18) years of age, engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than fourteen (14) years of age; and

(ii) Not the person's spouse

(B) It is an affirmative defense under this subdivision (a)(2) that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) Sexual assault in the third degree is a Class C felony.

History. Acts 2001, No. 1738, § 4; 2003, No. 1324, § 1.

inserted present (a)(2); and made minor stylistic and punctuation changes.

Amendments. The 2003 amendment

CASE NOTES

Lesser included offenses.

Trial court was not required to instruct a jury on the offense of carnal abuse in the third degree (former § 5-14-106) because it was not a lesser-included offense of rape; carnal abuse in the third degree

contained elements not found in § 5-14-103(a), and carnal abuse in the third degree differed from rape in more ways than just the seriousness of harm inflicted upon a victim. *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

5-14-127. Sexual assault in the fourth degree.

(a) A person commits sexual assault in the fourth degree if the person:

(1) Being twenty (20) years of age or older, engages in sexual intercourse or deviate sexual activity with another person who is:

(A) Less than sixteen (16) years of age; and

(B) Not the person's spouse; or

(2) Engages in sexual contact with another person who is:

(A) Less than sixteen (16) years of age; and

(B) Not the person's spouse.

(b)(1) Sexual assault in the fourth degree under subdivision (a)(1) of this section is a Class D felony.

(2) Sexual assault in the fourth degree under subdivision (a)(2) of this section is a Class A misdemeanor if the person engages only in sexual contact with another person as described in subdivision (a)(2) of this section.

History. Acts 2001, No. 1738, § 5; 2003, No. 1325, § 1.

Amendments. The 2003 amendment added the present subdivision designations in (a); added "with another ... age; or" at the end of present (a)(1); deleted "or sexual contact" following "sexual activity"

in present (a)(1); added (a)(2); in (b), added the subdivision (1) designation and substituted "under subdivision (a)(1) of this section is a Class D felony" for "is a Class A misdemeanor"; added (b)(2); and made related changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Sexual Offenses, 26 UALR L.J. 372.

CASE NOTES

Applicability.

Defendant convicted on a plea of nolo contendere to sexual misconduct was not entitled to an arrest of judgment even though § 5-14-107, the statute defining sexual misconduct as a criminal offense, had been repealed before he entered his plea of nolo contendere; the court could simply substitute the new offense of sex-

ual assault in the fourth degree for the offense of sexual misconduct because the elements of the two were "basically the same." *Holt v. State*, 85 Ark. App. 151, 147 S.W.3d 699 (2004).

Cited: *Pratt v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 537 (Sept. 30, 2004).

5-14-128. Registered offender living near school or daycare prohibited.

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare facility is located.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which the public or private elementary or secondary school or daycare facility was established.

(2) The exclusion in subsection (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school or daycare facility is established.

(c)(1) It is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(2) The exclusion in subsection (c)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of a Class D felony.

History. Acts 2003, No. 330, § 3.	5-14-129 may not apply to this section
A.C.R.C. Notes. References to “this chapter” in §§ 5-14-101 — 5-14-127 and	which was enacted subsequently.

5-14-129. Registered offender working with children prohibited.

(a) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to engage in an occupation or participate in a volunteer position that requires the sex offender to work or interact primarily and directly with a child under sixteen (16) years of age.

(b) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates this section is guilty of a Class D felony.

History. Acts 2005, No. 1779, § 1.

SUBCHAPTER 2 — MEDICAL RECORDS OF PERSONS CHARGED WITH SEX CRIMES

SECTION.	charged with sex crimes —
5-14-201. Definitions.	Victim notification of
5-14-202. Access by prosecutors to medical records of persons	health risk.

Cross References. Prostitution, § 5-70-101 et seq.

5-14-201. Definitions.

As used in this subchapter:

(1) “Relevant medical record” means a medical record of a person charged with having committed a sex crime that contain information that may reveal a health risk to the victim; and

(2) “Sex crime” means any offense described in § 5-14-101 et seq. or § 5-70-101 et seq.

History. Acts 2001, No. 1709, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Practice,
Procedure, and Courts, 24 UALR L.J. 523.

5-14-202. Access by prosecutors to medical records of persons charged with sex crimes — Victim notification of health risk.

(a)(1) Through a warrant issued by a judicial officer under Rule 13 of the Arkansas Rules of Criminal Procedure, a prosecuting attorney of this state is entitled access to a relevant medical record of any person charged with having committed a sex crime against another person, which act could have exposed the victim to a disease carried by the alleged offender.

(2)(A) An application by a prosecuting attorney for a relevant medical record shall describe with particularity the person whose relevant medical record is to be obtained and shall be supported by one (1) or more affidavits or recorded testimony before a judicial officer particularly setting forth the facts and circumstances tending to show that the person may present a danger to the health of a victim of a sex crime.

(B) If the judicial officer finds that the application meets the requirements of subdivision (a)(2)(A) of this section and that, on the basis of the proceeding before the judicial officer, there is reasonable cause to believe that the relevant medical record should be disclosed, the judicial officer shall issue a warrant directing disclosure of the medical record to the prosecuting attorney.

(b) Upon service of a warrant, a person having custody of a relevant medical record shall grant access to the prosecuting attorney and is not subject to any liability for granting the access.

(c)(1) If a prosecuting attorney after reviewing a medical record determines that a victim is subject to a health risk as a result of a sex crime, the prosecuting attorney may convey that health risk information to the victim, and the prosecuting attorney is not subject to any liability for disclosing that health risk information to the victim.

(2)(A) The prosecuting attorney may disclose the health risk information to the victim only.

(B) However, if the victim is a minor or is mentally incompetent, then the prosecuting attorney may disclose the health risk information to the victim's parent or legal guardian only.

(d) The prosecuting attorney is not subject to any liability to the victim for failing to obtain a medical record or failing to disclose health risk information to the victim.

(e) This subchapter does not repeal or supersede any rule of evidence or rule of criminal procedure that would allow the admissibility of a medical record as evidence in a criminal proceeding.

History. Acts 2001, No. 1709, § 2.

CHAPTER 15

SLANDER

SECTION.

5-15-101 — 5-15-109. [Repealed.]

5-15-101 — 5-15-109. [Repealed.]

Publisher's Notes. This chapter was repealed by Acts 2005, No. 1994, § 512. The chapter was derived from the following sources:

5-15-101. Acts 1869 (Adj. Sess.), No. 37, § 4, p. 88; C. & M. Dig., § 2401; Pope's Dig., § 3026; Acts 1975, No. 928, § 12; A.S.A. 1947, § 41-3455.

5-15-102. Acts 1869 (Adj. Sess.), No. 37, § 1, p. 88; C. & M. Dig., § 2394; Pope's Dig., § 3019; A.S.A. 1947, § 41-3457.

5-15-103. Acts 1869 (Adj. Sess.), No. 37, § 2, p. 88; C. & M. Dig., § 2395; Pope's Dig., § 3020; A.S.A. 1947, § 41-3458.

5-15-104. Rev. Stat., ch. 44, div. 8, art. 2, §§ 4-7; Acts 1868, No. 59, § 11; p. 214; C. & M. Dig., § 2393; Pope's Dig., § 3018;

Acts 1975, No. 928, § 11; A.S.A. 1947, § 41-3454.

5-15-105. Acts 1869 (Adj. Sess.), No. 37, § 3, p. 88; C. & M. Dig., § 2396; Pope's Dig., § 3021; A.S.A. 1947, § 41-3459.

5-15-106. Acts 1869 (Adj. Sess.), No. 37, § 6, p. 88; C. & M. Dig., § 2399; Pope's Dig., § 3024; A.S.A. 1947, § 41-3461.

5-15-107. Acts 1869 (Adj. Sess.), No. 37, § 5, p. 88; C. & M. Dig., § 2397; Pope's Dig., § 3022; A.S.A. 1947, § 41-3460.

5-15-108. Acts 1869 (Adj. Sess.), No. 37, § 7, p. 88; C. & M. Dig., § 2400; Pope's Dig., § 3025; A.S.A. 1947, § 41-3462.

5-15-109. Acts 1869 (Adj. Sess.), No. 37, § 4, p. 88; C. & M. Dig., § 2398; Pope's Dig., § 3023; A.S.A. 1947, § 41-3456.

CHAPTER 16

VOYEURISM OFFENSES

SECTION.

5-16-101. Crime of video voyeurism.

5-16-102. Voyeurism.

5-16-101. Crime of video voyeurism.

(a) It is unlawful to use any camera, videotape, photo-optical, photoelectric, or any other image recording device for the purpose of secretly observing, viewing, photographing, filming, or videotaping a person present in a residence, place of business, school, or other structure, or any room or particular location within that structure, if that person:

- (1) Is in a private area out of public view;
- (2) Has a reasonable expectation of privacy; and
- (3) Has not consented to the observation.

(b) A violation of this section is a Class D felony.

(c) The provisions of this section do not apply to any of the following:

(1) Video recording or monitoring conducted pursuant to a court order from a court of competent jurisdiction;

(2) Security monitoring operated by or at the direction of an occupant of a residence;

- (3) Security monitoring operated by or at the direction of the owner or administrator of a place of business, school, or other structure;
- (4) Security monitoring operated in a motor vehicle used for public transit;
- (5) Security monitoring and observation associated with a correctional facility, regardless of the location of the monitoring equipment;
- (6) Video recording or monitoring conducted by a law enforcement officer within the official scope of his or her duty; or
- (7) Videotaping pursuant to § 12-12-508(b).

History. Acts 1999, No. 757, § 1; 2001, No. 532, § 1.

Amendments. The 2001 amendment added (c)(7) and made related changes.

RESEARCH REFERENCES

ALR. Criminal prosecution of video or photographic voyeurism. 120 ALR 5th 337.

5-16-102. Voyeurism.

(a) As used in this section:

(1) “Nude or partially nude” means any person who has less than a fully opaque covering over the genitals, pubic area, or buttocks;

(2) “Private place” means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent; and

(3) “Public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility where a good, service, facility, privilege, advantage, or accommodation is offered, sold, or otherwise made available to the public.

(b) A person commits the offense of voyeurism if for the purpose of sexual arousal or gratification, he or she knowingly:

(1) Without the consent of each person who is present in the private place, looks into a private place that is, or is part of, a public accommodation and in which a person may reasonably be expected to be nude or partially nude; or

(2) Enters another person’s private property without the other person’s consent and looks into any person’s dwelling unit if all of the following apply:

(A) The person looks into the dwelling with the intent to intrude upon or interfere with a person’s privacy;

(B) The person looks into a part of the dwelling in which an individual is present;

(C) The individual present has a reasonable expectation of privacy in that part of the dwelling; and

(D) The individual present does not consent to the person’s looking into that part of the dwelling.

(c)(1) Except as provided in subdivision (c)(2) of this section, a violation of this section is a Class A misdemeanor.

(2) A violation of this section is a Class D felony if:

(A) A victim is under seventeen (17) years of age; and

(B) The person who commits the offense holds a position of trust or authority over the victim.

History. Acts 2005, No. 1642, § 1.

CHAPTER 17

DEATH THREATS

SECTION.

5-17-101. Communicating a death threat
concerning a school em-
ployee or student.

5-17-101. Communicating a death threat concerning a school employee or student.

(a) A person commits the offense of communicating a death threat concerning a school employee or student if:

(1) The person communicates to any other person a threat to cause the death of a school employee or student;

(2) The threat involves the use of a firearm or other deadly weapon;

(3) A reasonable person would believe the person making the threat intends to carry out the threat;

(4) The person making the threat purposely engaged in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of the threatened act; and

(5) There is a close temporal relationship between the threatened act and the substantial step.

(b) Conduct is not a substantial step under this section unless the conduct is strongly corroborative of the person's criminal purpose.

(c) Communicating a death threat concerning a school employee or student is a Class D felony.

(d) As used in this section, "school" means any:

(1) Elementary school, junior high school, or high school;

(2) Technical institute or post-secondary vocational-technical school;

or

(3) Two-year or four-year college or university.

History. Acts 2001, No. 1046, §§ 1, 2.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CHAPTERS 18-24

[Reserved]

***SUBTITLE 3. OFFENSES INVOLVING FAMILIES,
DEPENDENTS, ETC.*****CHAPTER 25
GENERAL PROVISIONS**

SECTION.

5-25-101. Definitions.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law: on Private Morals and Public Law, 4
Criminal Law, 4 UALR L.J. 189. UALR L.J. 511.
Barrier, Render Unto Caesar: An Essay

5-25-101. Definitions.

As used in this subtitle:

(1) "Adult" means any person eighteen (18) years of age or older;
(2) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member of or foreign instrument manipulated by another person;

(3)(A) "Incompetent" means any person unable to care for himself or herself because of physical or mental disease or defect.

(B) The status embraced by "incompetent" may or may not exist regardless of any adjudication concerning incompetency;

(4) "Minor" means any person under eighteen (18) years of age; and

(5) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

History. Acts 1975, No. 280, § 2401; 1977, No. 360, § 11; A.S.A. 1947, § 41-2401; Acts 2005, No. 1994, § 291.

Amendments. The 2005 amendment substituted "labia majora" for "vagina" in (4) and (5)(B).

CASE NOTES

Cited: Ritter v. United States Fid. & Guar. Co., 573 F.2d 539 (8th Cir. 1978).

CHAPTER 26

OFFENSES INVOLVING THE FAMILY

SUBCHAPTER

1. GENERAL PROVISIONS. [RESERVED.]
2. OFFENSES GENERALLY.
3. DOMESTIC BATTERING AND ASSAULT.
4. NONSUPPORT.
5. CUSTODY AND VISITATION.

Cross References. Abuse of adults,
§ 5-28-101 et seq.

Fines, § 5-4-201.
Term of imprisonment, § 5-4-401.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law:
Criminal Law, 4 UALR L.J. 189.
Barrier, Render Unto Caesar: An Essay

on Private Morals and Public Law, 4
UALR L.J. 511.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

5-26-201. Bigamy.
5-26-202. Incest.

SECTION.

5-26-203. Concealing birth.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1985, No. 506, § 2: Mar. 25, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 916, § 2: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain individuals who are in a position of power or authority over minors have avoided prosecution under current law for certain sexual activities with such minors and that such activities by individuals should be punished. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. The Constitutionality of Affirmative Defenses to Criminal Charges, 29 Ark. L. Rev. 430.

5-26-201. Bigamy.

(a) A person commits bigamy if, being married, he or she purports to marry another person.

(b) It is an affirmative defense to a prosecution under this section that at the time of the alleged offense the actor:

(1) Reasonably believed that the prior spouse was dead;

(2) Had lived apart from the prior spouse for five (5) consecutive years throughout which time the prior spouse was not known to the actor to be alive;

(3) Reasonably believed that a court had ordered a valid termination or annulment of the prior marriage; or

(4) Otherwise reasonably believed that the actor was legally eligible to marry.

(c) Bigamy is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2402; A.S.A. 1947, § 41-2402.

RESEARCH REFERENCES

Am. Jur. 11 Am. Jur. 2d, Bigamy, § 1 et seq. **C.J.S.** 10 C.J.S., Bigamy, § 1 et seq.

CASE NOTES

ANALYSIS

Completion of offense.

Defenses.

Evidence.

Indictment.

Proof.

Statute of limitations.

Venue.

Void marriage.

Completion of Offense.

It was the marrying by a person who had a husband or wife living that constituted the offense of bigamy, and the offense was complete upon the second marriage. *Scoggins v. State*, 32 Ark. 205 (1877) (decision under prior law).

Defenses.

Evidence that the first marriage was within the age of legal consent was no

defense, unless it could also be shown that it was annulled by a court of competent jurisdiction. *Walls v. State*, 32 Ark. 565 (1877) (decision under prior law).

Evidence.

A decree divorcing the accused rendered after the alleged bigamous marriage was prima facie evidence that his wife was living at the time of such marriage. *State v. Ashley*, 37 Ark. 403 (1881) (decision under prior law).

Testimony of the minister who performed the second marriage that he was duly authorized to perform the same and that he did so was competent although he did not sign the certificate of marriage. *Tanner v. State*, 116 Ark. 452, 173 S.W. 200 (1915) (decision under prior law).

Evidence of existence of legal marriage at time of second marriage held sufficient.

Filtingberger v. State, 216 Ark. 754, 227 S.W.2d 443 (1950) (decision under prior law).

Indictment.

Indictment held sufficient. *Johnson v. State*, 60 Ark. 308, 30 S.W. 31 (1895) (decision under prior law).

Proof.

The second marriage constituted the corpus delicti, and had to be proved. *McNeill v. State*, 117 Ark. 8, 173 S.W. 826 (1915) (decision under prior law).

Statute of Limitations.

The offense of bigamy was barred by the lapse of statutory period from the date of the bigamous marriage. *Scoggins v. State*,

32 Ark. 205 (1877) (decision under prior law).

Venue.

An indictment for bigamy had to be found in the county in which the bigamous marriage occurred. *Walls v. State*, 32 Ark. 565 (1877) (decision under prior law).

Void Marriage.

If a person married another, and afterward, while the first spouse was alive, married a third person, and afterward, when the first spouse was dead or divorced, married a fourth person, while the third was living, this last marriage was not bigamous, the second being absolutely void. *Halbrook v. State*, 34 Ark. 511 (1879) (decision under prior law).

5-26-202. Incest.

(a) A person commits incest if the person, being sixteen (16) years of age or older, purports to marry, has sexual intercourse with, or engages in deviate sexual activity with another person sixteen (16) years of age or older whom the actor knows to be:

- (1) An ancestor or a descendant;
- (2) A stepchild or adopted child;
- (3) A brother or sister of the whole or half blood;
- (4) An uncle, aunt, nephew, or niece; or
- (5) A stepgrandchild or adopted grandchild.

(b) A relationship referred to in this section includes a blood relationship without regard to legitimacy.

(c) Incest is a Class C felony.

History. Acts 1975, No. 280, § 2403; 1977, No. 360, § 12; 1985, No. 506, § 1; 1985, No. 916, § 1; A.S.A. 1947, § 41-2403; Acts 1997, No. 1321, § 1; 2003, No. 1469, § 1.

Publisher's Notes. This section may partially supersede § 9-11-106.

Amendments. The 2003 amendment, in (a), substituted "the actor" for "he" and

"sixteen (16) years of age or older whom the actor" for "he"; substituted "relationships" for "relationship" in (b); deleted "however, incest is a Class A felony if the victim is under sixteen (16) years of age and the perpetrator is over twenty-one (21) years of age at the time of the offense" at the end of (c); and made stylistic changes.

RESEARCH REFERENCES

Am. Jur. 41 Am. Jur. 2d, Incest, § 1 et seq.

C.J.S. 42 C.J.S., Incest, § 1 et seq.

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

Annual Survey of Caselaw, Criminal Procedure, 26 UALR L.J. 887.

CASE NOTES

ANALYSIS

Constitutionality.
Consent.
Corroboration.
Defenses.
Double jeopardy.
Evidence.
Gravamen of offense.
Indictment or information.
Instructions.
Knowledge.
Separate offenses.
Proof of age.

Constitutionality.

The classifications under this section regarding stepparents and stepchildren is not unconstitutional. *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

Consent.

The male may be convicted though he accomplished the act against the will of the female. *Gaston v. State*, 95 Ark. 233, 128 S.W. 1033 (1910) (decision under prior law).

Corroboration.

Evidence of a voluntary confession of the crime of incest made by the defendant to the officers who arrested him was admissible to corroborate the testimony of the accomplice so as to support a verdict of guilty. *Knowles v. State*, 113 Ark. 257, 168 S.W. 148 (1914) (decision under prior law).

Instruction was held proper which told the jury that if the prosecuting witness was more than sixteen years of age and consented to the sexual intercourse, that she was an accomplice and that her testimony would require corroboration. *Teel v. State*, 129 Ark. 180, 195 S.W. 32 (1917) (decision under prior law).

Testimony of daughter as to acts of intercourse did not have to be corroborated, since she could not be an accomplice. *Hicks v. State*, 219 Ark. 528, 243 S.W.2d 372 (1951) (decision under prior law).

That the legislature chose 16 years as the age of accountability for purposes of incest does not mean that it also intended that when an unwilling victim of incest is 16 then corroboration is required. *Camp v. State*, 288 Ark. 269, 704 S.W.2d 617 (1986).

Where the 16-year-old stepdaughter ran away following the incident and upon her return refused to stay at home, the intercourse was not with her consent and, accordingly, her testimony did not require corroboration under § 16-89-111. *Camp v. State*, 288 Ark. 269, 704 S.W.2d 617 (1986).

Defenses.

Even if the jury believed that defendant had no memory of incident of sexual intercourse with his daughter, that alone would not establish his innocence. *Johnson v. State*, 288 Ark. 101, 702 S.W.2d 2 (1986).

Double Jeopardy.

Defendant's prosecution for incest was not barred by dependent-neglect civil proceeding brought by the Department of Human Services inasmuch as the defendant simply was not threatened with multiple punishments and the double jeopardy clause was not offended. *Fariss v. State*, 303 Ark. 541, 798 S.W.2d 103 (1990).

Evidence.

Evidence held sufficient to support conviction. *Hicks v. State*, 219 Ark. 528, 243 S.W.2d 372 (1951) (decision under prior law).

Proffered proof of the prosecutrix's alleged or suspected sexual activity in other instances held not admissible under the rape-shield statute since proof of earlier sexual activity was not relevant to the charges of carnal abuse and incest. *Fields v. State*, 281 Ark. 43, 661 S.W.2d 359 (1983).

The trial judge did not abuse his discretion in admitting testimony of victim concerning counseling she had had after prior incidents of sexual intercourse with her father, as it tended to show that the prior incidents of incest had actually taken place. *Johnson v. State*, 288 Ark. 101, 702 S.W.2d 2 (1986).

Incest victim's testimony that defendant repeatedly engaged in sexual intercourse over a long period of time was, in and of itself, substantial evidence to support defendant's conviction; in addition, the jury could have viewed defendant's initial spontaneous statement to the officer as an admission of guilt. *Arnett v.*

State, 353 Ark. 165, 122 S.W.3d 484 (2003).

Evidence of victim's allegations of sexual abuse the victim purportedly made against the victim's natural father and grandfather held inadmissible without a proffer of the substance of the victim's purportedly inconsistent statements; the victim's prior allegations against others could not fairly be said to be relevant to impeaching the victim's credibility. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003).

Evidence was sufficient to sustain defendant's incest conviction where the child victim testified that defendant, her stepfather, told her to put her mouth on his penis, and that he licked her "private parts." *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Gravamen of Offense.

The gravamen of the offense was the unlawful carnal knowledge because of consanguinity. *Gaston v. State*, 95 Ark. 233, 128 S.W. 1033 (1910) (decision under prior law).

Defendant's conviction of two counts of incest was affirmed even though he was not related to his two nieces by blood; the incest statute, § 5-26-202, prohibited sexual intercourse or deviate sexual activity regardless of whether defendant and his nieces were related by affinity or consanguinity. *Heikkila v. State*, 352 Ark. 87, 98 S.W.3d 805 (2003). *

Indictment or Information.

Allegation of indictment of information held sufficient. *State v. Ratcliffe*, 61 Ark. 62, 31 S.W. 978 (1895); *Williford v. State*, 252 Ark. 397, 479 S.W.2d 244 (1972) (preceding decisions under prior law).

Instructions.

Instructions held sufficient. *Hicks v. State*, 219 Ark. 528, 243 S.W.2d 372 (1951) (decision under prior law).

Knowledge.

The only specific knowledge required for the crime of incest is that defendant knew that the prosecutrix was his daughter. *Johnson v. State*, 288 Ark. 101, 702 S.W.2d 2 (1986).

Separate Offenses.

Where there was ample testimony by which the jury could have found that the defendant father committed rape by devi-

ate sexual activity on one occasion and, on other occasions, was guilty of incest by having sexual intercourse with his daughter, each act constituted a separate offense, and the defendant was properly convicted on separate counts of rape and incest. *Massey v. State*, 278 Ark. 625, 648 S.W.2d 52 (1983).

A forcible act of intercourse with one's child would support a conviction for rape or incest, but not both, and neither is a lesser included offense of the other, though several elements are the same. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Where defendant had committed incest with the same victim, but in different counties, defendant could be charged in both counties for offenses occurring in the same time period without violating double jeopardy principles. *Fletcher v. State*, 318 Ark. 298, 884 S.W.2d 623 (1994).

Incest is not an ongoing crime for which the defendant could only be prosecuted once; this section indicates that a defendant commits the crime of incest each time he engaged in sexual intercourse with his adopted daughter. *Fletcher v. State*, 53 Ark. App. 135, 920 S.W.2d 42 (1996).

Defendant's convictions for incest in one county did not prevent his prosecution for incest in another county where the second prosecution was not for the same offense committed in the first county and where the offenses in the second county were not based on the same conduct for which he was convicted in the first county. *Fletcher v. State*, 53 Ark. App. 135, 920 S.W.2d 42 (1996).

Subdivision (a)(2) of this section encompasses elements found neither in the rape statute nor in the carnal abuse statute; to be found guilty of incest, the state must prove that a defendant engaged in sexual intercourse or deviate sexual activity with a person he knows to be his stepchild, and this additional element precludes the invocation of double jeopardy concerns because the offenses are not the same. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004).

Proof of Age.

Although there was no direct proof of defendant's age, circumstantial evidence was sufficient for the jury to conclude, without speculation or conjecture that de-

fendant was over sixteen years old. Hadley v. State, 322 Ark. 472, 910 S.W.2d 675 (1995).

Cited: Bateman v. State, 2 Ark. App. 339, 621 S.W.2d 232 (1981); Hall v. State,

11 Ark. App. 53, 666 S.W.2d 408 (1984); Yates v. State, 301 Ark. 424, 785 S.W.2d 199 (1990); Mobbs v. State, 307 Ark. 505, 821 S.W.2d 769 (1991).

5-26-203. Concealing birth.

(a) A person commits the offense of concealing birth if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive.

(b) Concealing birth is a Class D felony.

History. Acts 1975, No. 280, § 2404; A.S.A. 1947, § 41-2404; Acts 2001, No. 205, § 1.

Amendments. The 2001 amendment

inserted "or she" in (a); and substituted "D felony" for "A misdemeanor" in (b).

Cross References. Abortion, § 5-61-101 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Accomplices.
Elements of offense.
Evidence.

Accomplices.

One who aided and abetted a mother to conceal the death of her bastard child would have been guilty as an accessory (now accomplice). Massey v. State, 207 Ark. 675, 182 S.W.2d 671 (1944) (decision under prior law).

Where jury was justified in drawing inference that mother was guilty of concealing death of child, one who aided and abetted her could not complain upon ground there was no proof of mother's guilt. Massey v. State, 207 Ark. 675, 182

S.W.2d 671 (1944) (decision under prior law).

Elements of Offense.

It was immaterial whether the death occurred before or after its birth, or the means of concealing it. State v. Ellis, 43 Ark. 93 (1884) (decision under prior law).

The gist of the offense was the concealment of the death and not the causing of it. Washington v. State, 171 Ark. 357, 284 S.W. 42 (1926) (decision under prior law).

Evidence.

Evidence held insufficient to sustain a conviction. Washington v. State, 171 Ark. 357, 284 S.W. 42 (1926) (decision under prior law).

Cited: Smith v. State, 15 Ark. App. 266, 692 S.W.2d 622 (1985).

SUBCHAPTER 3 — DOMESTIC BATTERING AND ASSAULT

SECTION.

5-26-301. Legislative intent.

5-26-302. Definitions.

5-26-303. Domestic battering in the first degree.

5-26-304. Domestic battering in the second degree.

SECTION.

5-26-305. Domestic battering in the third degree.

5-26-306. Aggravated assault on a family or household member.

5-26-307. First degree assault on family or household member.

SECTION.

5-26-308. Second degree assault on family or household member.

5-26-309. Third degree assault on a family or household member.

SECTION.

5-26-310. Costs.

5-26-311. Residential confinement in home of victim prohibited.

5-26-312. Determination of pregnancy.

Publisher's Notes. Acts 1979, No. 396, § 9, provided that the act would not affect rights or duties matured, liabilities or penalties that were incurred, or proceedings begun before its effective date.

For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Assault and battery, § 5-13-201 et seq.

Enhanced penalties for offenses committed in the presence of a child, § 5-4-701 et seq.

RESEARCH REFERENCES

ALR. Battered woman syndrome: admissibility of expert or opinion testimony. 18 ALR 4th 1153.

Kicking as assault or assault with a deadly weapon. 19 ALR 5th 823.

UALR L.J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Jurisdiction. Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 UALR L.J. 537.

5-26-301. Legislative intent.

To the extent that any protected class of persons defined under this subchapter is afforded protection by any other existing or future statute of this state, this subchapter does not prevent a prosecution under any such existing or future statute.

History. Acts 1995, No. 1291, § 8.

A.C.R.C. Notes. Former § 5-26-301 has been renumbered as § 5-26-303.

5-26-302. Definitions.

As used in this subchapter:

(1)(A) "Dating relationship" means a romantic or intimate social relationship between two (2) individuals that is determined by examining the following factors:

- (i) The length of the relationship;
- (ii) The type of the relationship; and
- (iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(B) "Dating relationship" does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context; and

(2) "Family or household member" means:

- (A) A spouse;
- (B) A former spouse;

- (C) A parent;
- (D) A child, including any minor residing in the household;
- (E)(i) Persons related by blood within the fourth degree of consanguinity.
- (ii) The degree of consanguinity is computed pursuant to § 28-9-212;
- (F) Persons who presently or in the past have resided or cohabited together;
- (G) Persons who have or have had a child in common; or
- (H) Persons who are presently or in the past have been in a dating relationship together.

History. Acts 1995, No. 1291, § 8; 1999, No. 1317, § 1; 2001, No. 1678, § 2; 2005, No. 1875, § 2.

A.C.R.C. Notes. Former § 5-26-302 has been renumbered as § 5-26-304.

Amendments. The 2001 amendment made stylistic and punctuation changes; deleted “residing or cohabitating” following “presently” in present (2)(F); and added present (2)(G).

The 2005 amendment made stylistic and punctuation changes; and added present (1) and (2)(H).

Cross References. Domestic abuse definitions, § 9-15-103.

Petition form for protection orders, § 9-15-203.

Warrantless arrest for domestic abuse, § 16-81-113.

CASE NOTES

Applicability.

Defendant was not a household or family member where he and the victim had not cohabited and defendant’s relationship with the victim had ended; thus, defendant’s conviction for domestic bat-

tery had to be dismissed. *Wrenn v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 546 (Aug. 31, 2005).

Cited: *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

5-26-303. Domestic battering in the first degree.

(a) A person commits domestic battering in the first degree if:

(1) With the purpose of causing serious physical injury to a family or household member, the person causes serious physical injury to a family or household member by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring a family or household member or of destroying, amputating, or permanently disabling a member or organ of a family or household member’s body, the person causes such an injury to a family or household member; or

(3) The person causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life.

(b)(1) Domestic battering in the first degree is a Class B felony.

(2) However, domestic battering in the first degree is a Class A felony upon a conviction pursuant to subsection (a) of this section if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

- (i) Domestic battering in the first degree;
- (ii) Domestic battering in the second degree, § 5-26-304;
- (iii) Domestic battering in the third degree, § 5-26-305; or
- (iv) An equivalent penal law of this state or of another state or foreign jurisdiction.

History. Acts 1979, No. 396, § 1; A.S.A. 1947, § 41-1653; Acts 1995, No. 1291, § 1; 1999, No. 1317, § 2; 1999, No. 1365, § 1; 2001, No. 1553, § 8; 2003, No. 944, § 1; 2003, No. 1079, § 1; 2005, No. 1994, § 481.

A.C.R.C. Notes. This section was formerly codified as § 5-26-301. Former § 5-26-303 has been renumbered as § 5-26-305.

Pursuant to § 1-2-207, this section is set out above as amended by Acts 1999, No. 1365. This section was also amended by Acts 1999, No. 1317, to read as follows:

“(a) A person commits domestic battering in the first degree if:

“(1) With the purpose of causing serious physical injury to a family or household member, he causes serious physical injury to a family or household member by means of a deadly weapon; or

“(2) With the purpose of seriously and permanently disfiguring a family or household member or of destroying, amputating, or permanently disabling a member or organ of a family or household member’s body, he causes such an injury to a family or household member;

“(3) He causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life; or

“(4) He commits any act of domestic battering, as defined in §§ 5-26-303, 5-26-304, or 5-26-305, and within the past ten years, he has on two previous occasions been convicted of any act of battery, as defined by the laws of this state or by the

equivalent laws of any other state or foreign jurisdiction, against a family or household member.

“(b) Domestic battering in the first degree is a Class B felony.”

Amendments. The 2001 amendment added the subdivision designations in (b)(2); in the introductory paragraph of (b)(2), inserted “domestic battering in the first degree is a Class A felony” and substituted “within the past ... person has” for “the person has, within the past five (5) years”; and deleted “domestic battering in the first degree is a Class A felony” at the end of (b)(2)(B).

The 2003 amendment by No. 944 redesignated former (b)(2)-(b)(2)(B) as present (b)(2)(A)-(b)(2)(A)(ii); and, in present (b)(2)(A), substituted “subsection (a)” for “subdivisions (a)(1)(A)-(C) or subsection (b)” and inserted “committed against a woman the person knew or should have known was pregnant or if.”

The 2003 amendment by No. 1079 substituted “for conduct which occurred within the ten (10) years preceeding the commission of the current offense” for “within the past ten (10) years” in (a)(2); and substituted “for conduct which occurred within the five (5) years preceding the commission of the current offense” for “within the past five (5) years” in the introductory paragraph of (b)(2)(A).

The 2005 amendment deleted former (a)(2); added “(a)” following “subsection” in (b)(2); added “been convicted of a prior offense of” at the end of (b)(2)(B); and substituted “An” for “Violated” at the beginning of (b)(2)(B)(iv).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Domestic Violence, 26 UALR L.J. 363.

CASE NOTES

Cited: *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

5-26-304. Domestic battering in the second degree.

(a) A person commits domestic battering in the second degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes serious physical injury to a family or household member;

(2) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member by means of a deadly weapon; or

(3) The person recklessly causes serious physical injury to a family or household member by means of a deadly weapon.

(b)(1) Domestic battering in the second degree is a Class C felony.

(2) However, domestic battering in the second degree is a Class B felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree;

(iii) Domestic battering in the third degree, § 5-26-305; or

(iv) An equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction.

History. Acts 1979, No. 396, § 2; A.S.A. 1947, § 41-1654; Acts 1995, No. 1291, § 2; 1999, No. 1365, § 2; 2001, No. 1553, § 9; 2003, No. 944, § 2; 2003, No. 1079, § 1; 2005, No. 1994, § 481.

A.C.R.C. Notes. This section was formerly codified as § 5-26-302. Former § 5-26-304 has been renumbered as § 5-26-306.

Amendments. The 2001 amendment added the subdivision designations in (b)(2) and made related changes; and made minor stylistic changes throughout.

The 2003 amendment by No. 944 redesignated former (b)(2)-(b)(2)(B) as present (b)(2)(A)-(b)(2)(A)(ii); and inserted “com-

mitted against a woman the person knew or should have known was pregnant or if” in present (b)(2)(A).

The 2003 amendment by No. 1079, in (b)(2), substituted “for conduct ... the current offense” for “within the past five (5) years”; redesignated former (b)(2)(A)-(B) as (b)(2)(A)(i)-(ii); and made related and gender neutral changes.

The 2005 amendment added the subdivision (2)(A) and (B) designations in (b); deleted “or if” at the end of present (b)(2)(A); added “been convicted of a prior offense of” in present (b)(2)(B); deleted former (b)(2)(A), which read: “Committed a prior offense of”; redesignated former

(b)(2)(B) as present (b)(2)(B)(iv); deleted (b)(2)(B)(iv); added (b)(2)(C); and made “Violated” at the beginning of present related changes.

CASE NOTES

Evidence.

Sufficient evidence supported defendant’s convictions for second degree domestic battery, and third degree domestic battery where a “family or household member” who could be a victim of these offenses included someone with whom defendant had cohabitated in the past, it was proved that defendant and the victim

had previously cohabitated, and it was irrelevant that the victim was married to someone else at the time of the crimes. *Brock v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 198 (Mar. 2, 2005).

Cited: *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002).

5-26-305. Domestic battering in the third degree.

(a) A person commits domestic battering in the third degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member;

(2) The person recklessly causes physical injury to a family or household member;

(3) The person negligently causes physical injury to a family or household member by means of a deadly weapon; or

(4) The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to a family or household member by administering to the family or household member, without the family or household member’s consent, any drug or other substance.

(b)(1) Domestic battering in the third degree is a Class A misdemeanor.

(2) However, domestic battering in the third degree is a Class D felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) For conduct that occurred within the five (5) years preceding the commission of the current offense, the person has been convicted of a prior offense of:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree; or

(iv) An equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction.

History. Acts 1979, No. 396, § 3; A.S.A. 1947, § 41-1655; Acts 1995, No. 1291, § 3; 1999, No. 1365, § 3; 2001, No. 1553, § 10; 2003, No. 944, § 3; 2003, No. 1079, § 1; 2005, No. 1994, § 481.

A.C.R.C. Notes. This section was formerly codified as § 5-26-303. Former § 5-26-305 has been renumbered as § 5-26-307.

Amendments. The 2001 amendment added the subdivision designations in (b)(2) and made related changes; and made minor stylistic changes throughout.

The 2003 amendment by No. 944 redesignated former (b)(2)-(b)(2)(B) as present (b)(2)(A)-(b)(2)(A)(ii); and inserted “committed against a woman the person knew

or should have known was pregnant or if” in present (b)(2)(A).

The 2003 amendment by No. 1079 substituted “for conduct ... the current offense” for “within the past five (5) years” in (b)(2).

The 2005 amendment added the subdivision (2)(A) and (B) designations in (b); added “been convicted of a prior offense of” in present (b)(2)(B); deleted former (b)(2)(A), which read: “Committed a prior offense of”; redesignated former (b)(2)(B) as present (b)(2)(B)(iv); deleted “Violated” at the beginning of present (b)(2)(B)(iv); added (b)(2)(C); and made related changes.

CASE NOTES

ANALYSIS

Construction.
Evidence.
Sentence.

Construction.

In the context of domestic battering in the third degree, and enhancement in sentencing based on prior offenses, § 5-26-305 is, at the very least, ambiguous because it is subject to more than one interpretation. *Colburn v. State*, 352 Ark. 127, 98 S.W.3d 808 (2003).

Evidence.

Where the officer testified that defendant admitted to him that she had cut the victim, evidence was sufficient to establish that defendant committed third-degree domestic battering; moreover, because the trial court did not specify the subsection the statute upon which it relied to find guilt, and because the trial court could have relied upon subdivisions (a)(2) or (a)(3), neither of which required purposeful action, it was unnecessary to address whether there was sufficient evidence to establish that defendant acted purposely in cutting the victim. *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002).

Sufficient evidence supported defendant's convictions for second degree domestic battery, and third degree domestic

battery where a “family or household member” who could be a victim of these offenses included someone with whom defendant had cohabitated in the past, it was proved that defendant and the victim had previously cohabitated, and it was irrelevant that the victim was married to someone else at the time of the crimes. *Brock v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 198 (Mar. 2, 2005).

Sentence.

Where defendant battered the victim on August 14th and 15th, but pled guilty to the August 15th offense in municipal court first, the State could not enhance defendant's later conviction for the August 14th offense to a Class D felony based on the “prior” offense; the offense occurring on August 15th was not a “prior” offense since it occurred after the August 14th battering charge. *Colburn v. State*, 352 Ark. 127, 98 S.W.3d 808 (2003).

Sentencing defendant under the specific provisions of subsection (b) of this section, which enhanced the offense to a Class D felony, and to also sentence him under the general habitual offender statute, § 5-4-501, was impermissible and resulted in an illegal sentence of twelve years' imprisonment that had to be corrected. *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003).

5-26-306. Aggravated assault on a family or household member.

(a) A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, the person purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member.

(b) Aggravated assault on a family or household member is a Class D felony.

History. Acts 1979, No. 396, § 4; A.S.A. 1947, § 41-1656; Acts 1995, No. 1291, § 4. merly codified as § 5-26-304. Former § 5-26-306 has been renumbered as § 5-26-308.

A.C.R.C. Notes. This section was for-

CASE NOTES

Evidence.

Where defendant's parents, in a very distraught state, gave police written statements that defendant, while intoxicated, threatened them with a shotgun, but then recanted those statements at

trial, the evidence nevertheless supported a conviction and it was for the fact-finder to conclude that the parents' testimony was not credible. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

5-26-307. First degree assault on family or household member.

(a) A person commits first degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of death or serious physical injury to a family or household member.

(b) First degree assault on a family or household member is a Class A misdemeanor.

History. Acts 1979, No. 396, § 5; A.S.A. 1947, § 41-1657; Acts 1995, No. 1291, § 5. merly codified as § 5-26-305. Former § 5-26-307 has been renumbered as § 5-26-309.

A.C.R.C. Notes. This section was for-

CASE NOTES

Cited: *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

5-26-308. Second degree assault on family or household member.

(a) A person commits second degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of physical injury to a family or household member.

(b) Second degree assault on a family or household member is a Class B misdemeanor.

History. Acts 1979, No. 396, § 6; A.C.R.C. Notes. This section was formerly codified as § 5-26-306. A.S.A. 1947, § 41-1658; Acts 1995, No. 1291, § 6.

5-26-309. Third degree assault on a family or household member.

(a) A person commits third degree assault on a family or household member if the person purposely creates apprehension of imminent physical injury to a family or household member.

(b) Third degree assault on a family or household member is a Class C misdemeanor.

History. Acts 1979, No. 396, § 7; A.C.R.C. Notes. This section was formerly codified as § 5-26-307. A.S.A. 1947, § 41-1659; Acts 1995, No. 1291, § 7.

5-26-310. Costs.

(a) The abused in any misdemeanor or felony domestic violence offense shall not bear the costs associated with the filing of a criminal charge against the domestic violence offender or the costs associated with the issuance or service of a warrant and witness subpoena, except as provided in subsection (b) of this section.

(b) Nothing in this section shall be construed to prohibit a judge from assessing costs if an allegation of abuse is determined to be false.

(c)(1) Upon entering a plea of guilty or nolo contendere or being found guilty, a defendant violating § 5-26-303 — 5-26-305 or §§ 5-26-307 — 5-26-309 may be required to reimburse any abuse shelter or other entity providing a service to the victim under a provision of the Arkansas Crime Victims Reparations Act, § 16-90-701 et seq., if some proof of expense is provided in conjunction with the Arkansas Crime Victims Reparations Act, § 16-90-701 et seq.

(2)(A) If the defendant maintains the home in which the abuse occurred and the victim will continue to incur lodging costs, the defendant may be ordered to continue to provide remuneration for the victim's lodging under a provision of the Arkansas Crime Victims Reparations Act, § 16-90-701 et seq., until an action is commenced in a court of competent jurisdiction.

(B) Nothing in this section conflicts with or preempts any order of a judge in a divorce, custody, separate maintenance, or other related action to dissolve a marriage.

(d) Nothing in this section conflicts with or preempts a provision of § 16-90-703.

History. Acts 1995, No. 401, § 1; 2003, No. 1770, § 1.

Publisher's Notes. Acts 1995, No. 401, § 1, is also codified in part as § 9-15-202(c)(2).

Amendments. The 2003 amendment added (c) and (d).

Cross References. Violation of a protection order, § 5-53-134.

Filing fees for petitions for orders of

protection, § 9-15-202.
Crime Victims Reparations, Definitions,
§ 16-90-703.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Law, Offenses Involving the Family, 26
Arkansas General Assembly, Criminal UALR L.J. 375.

5-26-311. Residential confinement in home of victim prohibited.

In a case involving domestic or family violence, a court shall not order residential confinement as a condition of bond or probation for a defendant in any household shared by the defendant and the alleged victim.

History. Acts 1999, No. 1317, § 3.

5-26-312. Determination of pregnancy.

For purposes of §§ 5-26-303(b)(2), 5-26-304(b)(2), and 5-26-305(b)(2), a woman is considered pregnant four (4) weeks after conception.

History. Acts 2003, No. 944, § 4.

SUBCHAPTER 4 — NONSUPPORT

SECTION.
5-26-401. Nonsupport.
5-26-402 — 5-26-409. [Reserved.]
5-26-410. Jurisdiction.
5-26-411. Evidence of marriage and par-
entage — Spouse as wit-
ness.
5-26-412. Payment of fine to spouse or
guardian.

SECTION.
5-26-413. Temporary support order.
5-26-414. Order for periodic payments —
Release of defendant on
own recognizance.
5-26-415. Times when periodic payments
may be authorized.
5-26-416. Violation of order — Forfeiture
of recognizance.

Publisher's Notes. For Comments re-
garding the Criminal Code, see *Commen-
taries Volume B*.
Cross References. Child support, § 9-
14-101 et seq.
Fines, § 5-4-201.
Term of imprisonment, § 5-4-401.
Effective Dates. Acts 1951, No. 67,
§ 13: approved Feb. 9, 1951. Emergency
clause provided: "The existing laws per-
taining to wife and child abandonment
cases make no provision for the welfare,
support, and maintenance of such ne-
glected persons. This Act is necessary to
provide an adequate and effective means
in handling wife and child abandonment
cases, and for the promotion of justice, the

immediate preservation of public welfare,
health, and safety, an emergency is there-
fore declared and this Act shall take effect
and be in full force after its passage."
Acts 1953, No. 242, § 13: Mar. 6, 1953.
Emergency clause provided: "It has been
found and is declared by the General
Assembly of Arkansas that the existing
laws pertaining to wife and child aban-
donment are wholly inadequate, resulting
in great hardship to many wives and chil-
dren, great expenditures of welfare funds
for the support of children of able-bodied
fathers and a feeling of futility on the part
of many conscientious public officials.
This situation requires prompt and dras-
tic action. Therefore, an emergency is de-

clared to exist, and this Act being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from the date of its approval."

Acts 1983, No. 174, § 2: Feb. 15, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the present Arkansas criminal law on the of-

fense of nonsupport is constitutionally suspect on equal protection grounds; that there is an immediate need to remedy this law by legislative action. Therefore, an emergency is hereby declared to exist and this Act being necessary for the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child. 14 ALR 4th 717.

Statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 ALR 4th 649.

Am. Jur. 23 Am. Jur. 2d, Desert. & N., § 1 et seq.

Ark. L. Rev. Fuqua, Comments: Bastardy Law in Arkansas — The Need for Revision, 33 Ark. L. Rev. 178.

C.J.S. 41 C.J.S., Husb. & W., § 242 et seq.

67A C.J.S., Parent & C., § 359 et seq.

UALR L.J. Survey of Arkansas Law, Family Law, 1 UALR L.J. 200.

5-26-401. Nonsupport.

(a) A person commits the offense of nonsupport if he or she fails to provide support to the person's:

(1) Spouse who is physically or mentally infirm or financially dependent;

(2) Legitimate child who is less than eighteen (18) years of age;

(3) Illegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding; or

(4) Dependent child who is physically or mentally infirm.

(b)(1) Nonsupport is a Class A misdemeanor.

(2) However, nonsupport is a:

(A) Class D felony if the person:

(i) Leaves or remains outside the State of Arkansas for more than thirty (30) days while a current duty of support is unpaid. However, it is an affirmative defense to a charge under this section that the defendant did not leave or remain outside the state with the purpose of avoiding the payment of support;

(ii) Has previously been convicted of nonsupport; or

(iii) Owes more than two thousand five hundred dollars (\$2,500) in past-due child support, pursuant to a court order or by operation of law, and the amount represents at least four (4) months of past-due child support;

(B) Class C felony if the person owes more than ten thousand dollars (\$10,000) but less than twenty-five thousand dollars (\$25,000) in past-due child support, pursuant to a court order or by operation of law; or

(C) Class B felony if the person owes more than twenty-five thousand dollars (\$25,000) in past-due child support, pursuant to a court order or by operation of law.

(c) The court may direct that a fine imposed upon conviction of nonsupport or a bond forfeited in connection with a prosecution for nonsupport be paid for the support and maintenance of the person entitled to support

(d) A district court located in a county having a population in excess of two hundred thousand (200,000) inhabitants shall cause a warrant of arrest to be issued upon affidavit of a spouse or any person who is responsible for maintenance of a dependent child that states that nonsupport has taken place.

(e) Any person found guilty of nonsupport is also responsible for the court costs and administrative costs incurred by the court.

(f) The state may take judgment against any defendant convicted of nonsupport for any money expended by any state agency for the support and maintenance of the person with respect to whom the defendant had a duty to support.

(g) It is an affirmative defense to a prosecution under this section that the defendant had just cause to fail to provide the support.

History. Acts 1975, No. 280, § 2405; 1983, No. 174, § 1; A.S.A. 1947, § 41-2405; Acts 1997, No. 1282, § 1; 1999, No. 1484, § 1.

Cross References. Office of Child Support Enforcement, Employment of attorneys, § 9-14-210.

RESEARCH REFERENCES

UALR L.J. Legislation of the 1983 General Assembly, Family Law, 6 UALR L.J. 624.

Survey — Criminal Law, 12 UALR L.J. 183.

CASE NOTES

ANALYSIS

Continuing crime.

Divorce.

Evidence.

Failure to provide.

Indictment or information.

Instructions.

Jurisdiction.

Just cause.

Leaving the state.

Proof.

Continuing Crime.

Where defendant was convicted for failing to pay child support for six years, § 5-1-109(b)(2) did not bar the prosecution for the failure to pay support more than three years before defendant was charged because nonsupport was a contin-

uing crime. *Hampton v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 320 (May 20, 2004).

Divorce.

Procurement of a divorce did not relieve one of the legal responsibility for the support of his minor child. *Guyot v. State*, 222 Ark. 275, 258 S.W.2d 569 (1953) (decision under prior law).

Evidence.

Evidence held sufficient to show a violation of former section. *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958) (decision under prior law).

Evidence held sufficient to support conviction. *Nelke v. State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986).

While the state must prove every ele-

ment of its criminal nonsupport case beyond a reasonable doubt, it may do so by circumstantial, as well as direct, evidence. *Nelke v. State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986).

Evidence held insufficient to support conviction of failing to support dependent spouse. *Woodberry v. State*, 35 Ark. App. 129, 811 S.W.2d 339 (1991).

Failure to Provide.

In order to convict a husband it had to be shown that the husband willfully or negligently failed to provide adequately for his wife and children, but a mere failure on account of inability was insufficient. *Dempsey v. State*, 108 Ark. 76, 157 S.W. 734 (1913) (decision under prior law); *Nelke v. State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986).

Where a husband had abandoned his wife and minor children, total provision made to them for three months held to be failure to provide for the wife and children. *Dempsey v. State*, 108 Ark. 76, 157 S.W. 734 (1913) (decision under prior law).

Uncontradicted testimony by a child support enforcement office employee that he believed defendant's child turned 17 did not meet the definition of hearsay because it was merely an opinion, and it was sufficient to establish the child's age for purposes of supporting defendant's conviction for nonsupport. *Hampton v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 320 (May 20, 2004).

Indictment or Information.

Information held to sufficiently charge the offense. *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958) (decision under prior law).

Instructions.

An instruction held properly refused where it was abstract, argumentative and misleading. *Stephens v. State*, 172 Ark. 398, 288 S.W. 926 (1926) (decision under prior law).

Jurisdiction.

Former similar section did not give the chancery court jurisdiction to compel support for illegitimate child. *Higgs v. Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957) (decision under prior law).

The fact that the divorce court had retained jurisdiction did not nullify a penal statute covering the same subject mat-

ter. *Guyot v. State*, 222 Ark. 275, 258 S.W.2d 569 (1953) (decision under prior law).

Although Ark. Const., Art. 7, § 28 vested jurisdiction in the county courts over all matters relating to paternity, such jurisdiction was civil in nature and did not bar criminal prosecution in the circuit court. *Platt v. Ponder*, 233 Ark. 682, 346 S.W.2d 687 (1961) (decision under prior law).

Just Cause.

The words "without good cause" meant such cause as was a sufficient ground for divorce and the severance of the marital relation under the law. *Miller v. State*, 123 Ark. 480, 185 S.W. 789 (1916) (decision under prior law).

Neglect, refusal or abandonment had to be without good cause. *Dumbroski v. State*, 192 Ark. 263, 90 S.W.2d 973 (1936) (decision under prior law).

Leaving the State.

It was necessary on the felony charge to prove that the husband had left the state as a part of his act of desertion. *Dunham v. State*, 169 Ark. 257, 275 S.W. 325 (1925); *Green v. State*, 230 Ark. 1007, 328 S.W.2d 89 (1959) (preceding decisions under prior law).

Instruction regarding defendant's leaving state held erroneous since it would permit jury to find defendant guilty whether or not his act of leaving the state was connected with his act of desertion. *Green v. State*, 230 Ark. 1007, 328 S.W.2d 89 (1959) (decision under prior law).

Proof.

A marriage between the defendant and his alleged wife could be proved by a preponderance of the testimony, but whether he abandoned and refused to support his wife and child had to be proved beyond a reasonable doubt. *Linville v. State*, 129 Ark. 36, 195 S.W. 382 (1917) (decision under prior law).

Trial court did not err in denying defendant's motion dismiss or motion for a directed verdict as felony nonsupport was a continuing offense and defendant was charged within three years of committing the offense. *Morris v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 767 (Nov. 3, 2004).

Cited: *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977); *Pickens-Bond Constr.*

Co. v. Case, 266 Ark. 323, 584 S.W.2d 21 (1979); Madewell v. State, 290 Ark. 580, 720 S.W.2d 913 (1986); Smith v. State, 296 Ark. 451, 757 S.W.2d 554 (1988); Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989); Hagen v. State, 318 Ark. 139, 883 S.W.2d 832 (1994).

5-26-402 — 5-26-409. [Reserved.]

5-26-410. Jurisdiction.

(a) When any person is liable to be prosecuted under § 5-26-401, he or she may be indicted, tried, and convicted in:

- (1) The county where the violation of § 5-26-401 originally occurred;
- (2) Any county where he or she might be apprehended; or
- (3) The county where the injured spouse or child resided at the time of the filing of the indictment or information.

(b) Subdivisions (a)(2) and (3) of this section apply because each successive day the offense continues is declared to be a violation of § 5-26-401 not only in the county where the offense originally occurred but in any county where the offender or the injured spouse or child resides while the course of conduct condemned in § 5-26-401 continues.

History. Acts 1951, No. 67, § 3; 1953, No. 242, § 3; 1975, No. 928, § 8; A.S.A. 1947, § 41-2451.

5-26-411. Evidence of marriage and parentage — Spouse as witness.

(a) No other evidence is required to prove marriage of a husband and wife or that the defendant is the lawful parent of a legitimate child or has acknowledged paternity of an illegitimate child than is required to prove this fact in a civil action.

(b) The spouse and parent is a competent witness to testify in any case brought under this chapter and to a matter relevant to this chapter, including the fact of the marriage and the parentage of the child.

(c) A legally adopted child and a child whose parentage was determined in a paternity proceeding is within the provisions of this chapter and no proof other than an order of a proper court is required to prove parentage.

History. Acts 1951, No. 67, § 10, as amended and renumbered by Acts 1953, No. 242, § 11; 1981, No. 633, § 4; A.S.A. 1947, § 41-2458; Acts 1995, No. 1296, § 3. **Cross References.** Paternity proceedings, § 9-10-102 et seq.

5-26-412. Payment of fine to spouse or guardian.

When a fine is imposed a court may direct that it be paid in whole or in part to a spouse or to a guardian or custodian of a child.

History. Acts 1951, No. 67, § 6; 1953, No. 242, § 6; A.S.A. 1947, § 41-2453.

5-26-413. Temporary support order.

At any time before a trial or pending appeal, upon motion of a complainant and upon notice to the defendant, the court may:

- (1) Enter a temporary support order as it deems just, providing for the support of a neglected spouse or child, pendente lite; and
- (2) Punish for violation of the temporary support order as for contempt.

History. Acts 1951, No. 67, § 5; 1953, No. 242, § 5; 1981, No. 633, § 1; A.S.A. 1947, § 41-2452.

5-26-414. Order for periodic payments — Release of defendant on own recognizance.

(a) In its discretion, the original trial court may:

(1) Order a defendant who violates § 5-26-401 to pay a certain sum periodically, for a time not to exceed one (1) year, to the spouse or to the guardian or custodian of a child; and

(2) Release the defendant from custody upon the defendant's entering a recognizance, with or without sureties, in such sum as the original trial court may direct.

(b) The conditions of the recognizance shall be that the defendant:

(1) Will comply with the terms of the order; and

(2) Appear in court on a day certain.

(c) Failure to appear is punishable by imprisonment for not less than ten (10) days nor more than ninety (90) days and shall not be suspended.

History. Acts 1951, No. 67, § 7; 1953, No. 242, § 7; 1981, No. 633, § 2; A.S.A. 1947, § 41-2454.

CASE NOTES

Cited: Allen v. State, 260 Ark. 466, 541 S.W.2d 675 (1976).

5-26-415. Times when periodic payments may be authorized.

The original trial court may issue the order provided in § 5-26-414:

- (1) Before the trial, with the consent of the defendant;
- (2) At the trial, on entry of plea of guilty; or
- (3) After conviction, in lieu of the penalty provided in this act or in addition to the penalty provided in this act.

History. Acts 1951, No. 67, § 8; 1953, No. 242, § 8; A.S.A. 1947, § 41-2455.

A.C.R.C. Notes. Regarding the phrase "the penalty provided in this act" in subdivision (3) of this section, Acts 1951, No.

67, §§ 1 and 2, as amended by Acts 1953, No. 42, provided penalties for the abandonment or desertion of a wife or child. However, in connection with the adoption of the Arkansas Criminal Code, those sec-

tions were repealed by Acts 1975, No. 928, § 3. Present law concerning penalties for nonsupport is codified at § 5-26-401.

Meaning of "this act". Acts 1951, No. 67, as amended by Acts 1953, No. 242, codified as §§ 5-26-410 — 5-26-416.

5-26-416. Violation of order — Forfeiture of recognizance.

(a) When the original trial court is satisfied by information and proof under oath that any time during the year the defendant has violated a term of its order, the original trial court shall proceed with the trial of the defendant under the original conviction, or enforce the original sentence, as the case may be.

(b) In case of forfeiture of recognizance and the enforcement of forfeiture of recognizance by execution, in the discretion of the original trial court the sum recovered may be paid in whole or in part to a spouse or to a guardian or custodian of a minor child.

History. Acts 1951, No. 67, § 9; 1953, No. 242, § 9; 1981, No. 633, § 3; A.S.A. 1947, § 41-2456.

SUBCHAPTER 5 — CUSTODY AND VISITATION

SECTION.

5-26-501. Interference with visitation.

5-26-502. Interference with court-ordered custody.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

RESEARCH REFERENCES

ALR. Taking child by or under authority of parent or one in loco parentis. 20 ALR 4th 823.

Abduction of own child. 49 ALR 4th 7.

5-26-501. Interference with visitation.

(a)(1) A person commits the offense of interference with visitation if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of visitation with the minor.

(2) A person claiming interference with visitation shall provide a copy of the signed court order or decree regarding custody or visitation rights to a law enforcement officer as proof of the interference with visitation.

(b)(1)(A) Interference with visitation is a Class C misdemeanor.

(B) However, interference with visitation is a Class D felony if the minor is taken, enticed, or kept outside of the State of Arkansas.

(2) Any person who has pleaded guilty or nolo contendere to or is found guilty of interference with visitation more than two (2) times is guilty of a Class A misdemeanor.

(c) It is an affirmative defense to a prosecution that:

(1) A person or lawful guardian committed the act to protect the minor from imminent physical harm if the defendant's:

(A) Belief that physical harm was imminent is reasonable; and

(B) Conduct in withholding visitation rights was a reasonable response to the harm believed to be imminent;

(2) A person or lawful guardian committed the act based on a reasonable belief that the person entitled to visitation would remove the minor from the jurisdiction of the court;

(3) The act was committed with the mutual consent of all parties having a right to custody and visitation of the minor; or

(4) The act was otherwise authorized by law.

History. Acts 1985, No. 540, § 1;
A.S.A. 1947, § 41-2415; Acts 1999, No.
1129, § 1.

5-26-502. Interference with court-ordered custody.

(a) A person commits the offense of interference with court-ordered custody if the person:

(1) Knowing that he or she has no lawful right to do so, takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of custody of the minor;

(2) Without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another person to take or entice, any minor or any incompetent person from the custody of:

(A) The parent of the minor or incompetent person;

(B) The guardian of the minor or incompetent person;

(C) A public agency having lawful charge of the minor or incompetent person;

(D) Any other lawful custodian; or

(E) A person described in subdivisions (a)(2)(A), (B), or (D) of this section while the custodian and minor are being housed at a shelter as defined in § 9-4-102;

(3)(A) Has been awarded custody or granted an adoption or guardianship of a juvenile pursuant to or arising out of a dependency-neglect action pursuant to the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., and subsequently places the juvenile in the care or supervision of any person:

(i) From whom the juvenile was removed; or

(ii) The court has specifically ordered not to have care, supervision, or custody of the juvenile.

(B) Subdivision (a)(3)(A) of this section shall not be construed to prohibit a placement described in subdivision (a)(3)(A) of this section if the person who has been granted custody, adoption, or guardian-

ship obtains a court order to that effect from the juvenile division of circuit court that made the award of custody, adoption, or guardianship; or

(4) Accepts or acquiesces in taking physical custody for any length of time of a juvenile who was removed from the person or if the court has specifically ordered that the person not have care, supervision, or custody of the juvenile pursuant to or arising out of a dependency-neglect action pursuant to the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.

(b)(1)(A) Interference with court-ordered custody under subdivision (a)(1) of this section is a Class A misdemeanor.

(B) However, interference with court-ordered custody under subdivision (a)(1) of this section is a Class D felony if the minor is:

(i) Taken, enticed, or kept outside the State of Arkansas; or

(ii) Taken from any person entitled by a court decree or order to the right of custody of the minor while the custodian and minor are being housed at a shelter as defined in § 9-4-102, even if the minor is not taken outside the State of Arkansas.

(2) Interference with court-ordered custody under subdivision (a)(2) of this section is a Class C felony.

(3)(A) Interference with court-ordered custody under subdivision (a)(3) of this section is a Class A misdemeanor.

(B) However, any subsequent offense of interference with court-ordered custody under subdivision (a)(3) of this section shall constitute a Class C felony.

(4)(A) Interference with court-ordered custody under subdivision (a)(4) of this section is a Class A misdemeanor.

(B) However, any subsequent offense of interference with court-ordered custody under subdivision (a)(4) of this section shall constitute a Class C felony.

(c)(1) In every case prior to serving a warrant for arrest on a person charged with the offense of interference with court-ordered custody, the police officer or other law enforcement officer shall inform the Department of Health and Human Services of the circumstances of any minor named in the information or indictment as having been taken, enticed, or kept from the custodian in a manner constituting interference with court-ordered custody or placed with a person prohibited under subdivision (a)(3) of this section.

(2) A representative of the department shall be present with the arresting police officer or law enforcement officer to take the minor into temporary custody of the department pending further proceedings by a court of competent jurisdiction.

(d)(1) A court of competent jurisdiction shall determine the immediate custodial placement of any minor pursuant to a petition brought by the department or an agency of the department to determine if there is probable cause to believe the minor may be:

(A) Removed from the jurisdiction of the court;

(B) Abandoned; or

(C) Outside the immediate care or supervision of a person lawfully entitled to custody.

(2) Except in a situation arising under subdivisions (a)(3) or (4) of this section, the court shall immediately give custody to the lawful custodian if it finds that the lawful custodian is present before the court.

(e)(1) A petitioner shall comply with the requirements of § 9-27-312 with regard to the giving of a notice and the setting of a hearing.

(2) The petitioner is immune from liability with respect to any conduct undertaken pursuant to this section unless it is determined that the petitioner acted with actual malice.

History. Acts 1985, No. 540, § 2; A.S.A. 1947, § 41-2416; Acts 1987, No. 483, § 1; 1987, No. 898, § 1; 1995, No. 1343, § 1; 2001, No. 1503, § 16; 2001, No. 1553, § 11; 2005, No. 1870, § 1.

Amendments. The 2001 amendment by No. 1503 added present (a)(3) and (4); added present (b)(3) and (4); added “or placed with a person prohibited under subdivision (a)(3)(A) of this section” in present (c)(1); and added “Except in situations arising under subdivisions (a)(3)(A) or (a)(4)(A) of this section” in present (d)(2).

The 2001 amendment by No. 1553

added the subdivision designations in former (a)(1) and made related changes; substituted “department” for “Department of Human Services” in (c)(2); and substituted “§ 9-27-312” for “§ 9-27-334” in present (e)(1).

The 2005 amendment added present (a)(2)(E) and (b)(1)(B)(ii); made related changes; and inserted “court-ordered” preceding “custody” in present (b)(2).

Cross References. Child custody and visitation, § 9-13-101 et seq.

Duties and responsibilities of custodian, § 9-27-353.

RESEARCH REFERENCES

UALR L.J. Survey — Family Law, 10 UALR L.J. 577.

CASE NOTES

ANALYSIS

Double jeopardy.

Intent.

Double Jeopardy.

Defendant father found guilty of contempt for failure to timely return child to mother's custody could not also be convicted of a violation of this section for the same offense. *Hobbs v. State*, 43 Ark. App. 149, 862 S.W.2d 285 (1993).

Intent.

Conviction for taking child from legal custody and out of state was upheld where there was no evidence that the court had any knowledge of defendant's intent to remove child from its jurisdiction, and intent of defendant to return child did not take her out of operation of former section which provided penalty for taking children from person having legal custody. *Estes v. State*, 246 Ark. 1145, 442 S.W.2d 221 (1969) (decision under prior law).

CHAPTER 27

OFFENSES AGAINST CHILDREN OR INCOMPETENTS

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. OFFENSES GENERALLY.

SUBCHAPTER.

3. ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979.
4. USE OF CHILDREN IN SEXUAL PERFORMANCES.
5. FRAUDULENT IDENTIFICATION DOCUMENTS FOR MINORS.
6. COMPUTER CRIMES AGAINST MINORS.

Cross References. Abuse of adults,
§ 5-28-101 et seq.

Fines, § 5-4-201.
Term of imprisonment, § 5-4-401.

RESEARCH REFERENCES

ALR. Child molestation: penal statute.
1 ALR 4th 38.

UALR L.J. Survey of Arkansas Law:
Criminal Law, 4 UALR L.J. 189.

Barrier, *Render Unto Caesar: An Essay
on Private Morals and Public Law*, 4
UALR L.J. 511.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-27-201. Endangering the welfare of an incompetent person in the first degree.
- 5-27-202. Endangering the welfare of an incompetent person in the second degree.
- 5-27-203. Endangering the welfare of an incompetent person in the third degree.
- 5-27-204. [Transferred.]
- 5-27-205. Endangering the welfare of a minor in the first degree.
- 5-27-206. Endangering the welfare of a minor in the second degree.
- 5-27-207. Endangering the welfare of a minor in the third degree.
- 5-27-208. [Reserved.]
- 5-27-209. Contributing to the delinquency of a minor.
- 5-27-210. Parental responsibility for student's firearm possession.

SECTION.

- 5-27-211 — 5-27-219. [Reserved.]
- 5-27-220. Contributing to the delinquency of a juvenile.
- 5-27-221. Permitting abuse of a minor.
- 5-27-222. Neglect of minor resulting in delinquency.
- 5-27-223. [Repealed.]
- 5-27-224. [Repealed.]
- 5-27-225. [Repealed.]
- 5-27-226. [Repealed.]
- 5-27-227. Providing minors with tobacco products and cigarette papers — Purchase, use, or possession prohibited — Placement of tobacco vending machines.
- 5-27-228. [Repealed.]
- 5-27-229. Soliciting money or property from incompetents.
- 5-27-230. Exposing a child to a chemical substance or methamphetamine.
- 5-27-231, 5-27-232. [Transferred.]

Cross References. Furnishing intoxicating liquor to minors, §§ 3-3-201 — 3-3-204.

Effective Dates. Acts 1887, No. 17, § 3: effective on passage.

Acts 1911, No. 98, § 3: effective on passage.

Acts 1929, No. 152, § 32: approved Mar. 20, 1929. Emergency clause provided: "It is hereby ascertained and declared that both the State Equalizing Fund and the Common School Fund are inadequate to provide equal educational opportunities for the children of this State, so that there is great danger of their not getting an education; that there are hundreds of school districts in this state where the equipment is insufficient, the teaching is incompetent and the terms of school are not more than three months per year; that the local maximum levy of eighteen (18) mills for school purposes is inadequate to provide better facilities; that the funds to be raised by this Act will be used to equalize the educational opportunities to all of the school children of this State by increasing the amount to be spent by the Common Schools and by proving an adequate fund to help the weaker schools of the rural sections. It is therefore necessary for the preservation of the public peace, health and safety that this Act go into immediate operation, and accordingly it is provided that this Act shall take effect and be in full force from and after its passage."

Acts 1967, No. 422, § 3: emergency failed to pass.

Acts 1967, No. 476, § 2: Apr. 4, 1967. Emergency clause provided: "It is hereby found and determined by the General Assembly that under existing law a minor under the age of eighteen (18) must be accompanied by a parent or guardian if he wishes to play pool or billiards; that today the game of pool and billiards is a wholesome form of entertainment that furnishes many hours of pleasure and relaxation for thousands of persons of all ages in this State; that family recreation centers are today operated as recreational facilities; that the presence of minors in such establishments does not corrupt the morals of a minor or in any way contribute to the delinquency of such minors; and that in order to remove the unfounded stigma that is attached to minors playing pool or billiards, it is necessary that this

act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 451, § 51: July 1, 1975.

Acts 1981, No. 526, § 3: Mar. 16, 1981. Emergency clause provided: "It is hereby found and determined that clarification of the laws relative to the use of coin-operated amusement machines or other amusement devices in family recreation centers in this State is needed; that the presence of such machines in such centers would provide much-needed amusement to the young citizens of this State; and, that such machines would generate additional revenues. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 990, § 4: Apr. 16, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that law enforcement agencies and prosecuting attorneys need notification of child abuse in order to make timely responses and investigations. Therefore, this Act is immediately necessary to enable law enforcement agencies and prosecuting attorneys to quickly respond to acts of child abuse. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1126, § 13: September 1, 1993.

Acts 1997, No. 1337, § 30: July 1, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that the regulation of the manufacture, distribution, and sale of tobacco products in this state should be transferred from the Department of Finance and Administration to an independent agency; that this act establishes the Arkansas Tobacco Control Board as such independent agency; that the transfer of duties should occur at the beginning of the next fiscal year; and that unless this emergency clause is adopted, the transfer will most likely not occur until after the

beginning of the next fiscal year. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public

peace, health, and safety shall be in full force and effect from and after July 1, 1997.”

RESEARCH REFERENCES

ALR. Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR 4th 756.

Statute limiting physician-patient priv-

ilege in judicial proceedings relating to child abuse or neglect. 44 ALR 4th 649.

Am. Jur. 47.Am. Jur. 2d, Juv. Cts., § 63 et seq.

5-27-201. Endangering the welfare of an incompetent person in the first degree.

(a) A person commits the offense of endangering the welfare of an incompetent person in the first degree if, being a parent, guardian, person legally charged with care or custody of an incompetent person, or a person charged with supervision of an incompetent person, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to an incompetent person; or

(2) Deserts the incompetent person under circumstances creating a substantial risk of death or serious physical injury.

(b) Endangering the welfare of an incompetent person in the first degree is a Class D felony.

History. Acts 1975, No. 280, § 2409; A.S.A. 1947, § 41-2409; Acts 2005, No. 2216, § 1.

inserted “or she” following “he” in (a); inserted (a)(1) and the subdivision (a)(2) designation; and made related changes.

Amendments. The 2005 amendment

5-27-202. Endangering the welfare of an incompetent person in the second degree.

(a)(1) A person commits the offense of endangering the welfare of an incompetent person in the second degree if he or she knowingly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of a person known by the actor to be an incompetent person.

(2) As used in this section, “serious harm to the physical or mental welfare of a person” means physical or mental injury that causes:

(A) Protracted disfigurement;

(B) Protracted impairment of physical or mental health; or

(C) Loss or protracted impairment of the function of any bodily member or organ.

(b) Endangering the welfare of an incompetent person in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2410; redesignated former (a) as present (a)(1); A.S.A. 1947, § 41-2410; Acts 2005, No. 2216, § 2. inserted “or she” in present (a)(1); and added (a)(2).

Amendments. The 2005 amendment

5-27-203. Endangering the welfare of an incompetent person in the third degree.

(a)(1) A person commits the offense of endangering the welfare of an incompetent person in the third degree if the person recklessly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of a person known by the actor to be an incompetent person.

(2) As used in this section, “serious harm to the physical or mental welfare of a person” means physical or mental injury that causes

(A) Protracted disfigurement;

(B) Protracted impairment of physical or mental health; or

(C) Loss or protracted impairment of the function of any bodily member or organ.

(b) Endangering the welfare of an incompetent person in the third degree is a Class B misdemeanor.

History. Acts 2005, No. 2216, § 3.

Publisher’s Notes. This section was formerly codified as § 5-27-232.

5-27-204. [Transferred.]

Publisher’s Notes. Former § 5-27-204 was renumbered as § 5-27-206.

5-27-205. Endangering the welfare of a minor in the first degree.

(a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor; or

(2) Deserts a minor less than ten (10) years old under circumstances creating a substantial risk of death or serious physical injury.

(b) Endangering the welfare of a minor in the first degree is a Class D felony.

(c)(1) It is an affirmative defense to a prosecution under this section that a parent voluntarily delivered a child to and left the child with, or voluntarily arranged for another person to deliver a child to and leave the child with, a medical provider or law enforcement agency as provided in § 9-34-201 et seq.

(2)(A) Nothing in subdivision (c)(1) of this section shall be construed to create a defense to any prosecution arising from any conduct other

than the act of delivering a child as described in subdivision (c)(1) of this section.

(B) Subdivision (c)(1) of this section specifically does not constitute a defense to any prosecution arising from an act of abuse or neglect committed prior to the delivery of a child to a medical provider or law enforcement agency as provided in § 9-34-201 et seq.

History. Acts 1975, No. 280, § 2407; A.S.A. 1947, § 41-2407; Acts 2001, No. 236, § 2; 2005, No. 2207, § 1.

Publisher's Notes. This section was formerly codified as § 5-27-203.

Amendments. The 2001 amendment added (c).

The 2005 amendment inserted (a)(1) and the subdivision (a)(2) designation; and made related changes.

Cross References. Safe haven babies and voluntary delivery of a child, § 9-34-201 et seq.

RESEARCH REFERENCES

ALR. Parents' criminal liability for failure to provide medical attention to their children. 118 ALR 5th 253.

CASE NOTES

ANALYSIS

Construction.

Illustrative cases.

Construction.

The term "desert," as used in subsection (a), is ambiguous and requires the State to show that defendant has no intent to return for the child in order to establish a violation. *Burnette v. State*, 354 Ark. 584, 127 S.W.3d 479 (2003).

Illustrative Cases.

Defendant's conviction for endangering the welfare of a child in the first degree, where the four-year-old child wandered onto the street when defendant left home briefly to aid a girlfriend whose car had broken down, was reversed because the term "desert" was ambiguous and the State failed to show that defendant intended to leave the child permanently. *Burnette v. State*, 354 Ark. 584, 127 S.W.3d 479 (2003).

5-27-206. Endangering the welfare of a minor in the second degree.

(a)(1) A person commits the offense of endangering the welfare of a minor in the second degree if he or she knowingly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of another person known by the person to be a minor.

(2) As used in this section, "serious harm to the physical or mental welfare" means physical or mental injury that causes:

(A) Protracted disfigurement;

(B) Protracted impairment of physical or mental health; or

(C) Loss or protracted impairment of the function of any bodily member or organ.

(b) Endangering the welfare of a minor in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2408; A.S.A. 1947, § 41-2408; Acts 2005, No. 2207, § 2.

Publisher's Notes. This section was formerly codified as § 5-27-204.

Amendments. The 2005 amendment

redesignated former (a) as present (a)(1); inserted "or she" in (a)(1); and added (a)(2).

Cross References. Employment in certain places and occupations prohibited, § 11-6-101 et seq.

RESEARCH REFERENCES

ALR. Parents' criminal liability for failure to provide medical attention to their children. 118 ALR 5th 253.

CASE NOTES

ANALYSIS

In general.
Evidence of abuse.
Instructions.

In General.

The offense of endangering the welfare of a minor does not encompass allegations of sexual misconduct, and should not be used as an alternative to sexual offense charges. *Leheny v. State*, 307 Ark. 29, 818 S.W.2d 236 (1991).

Evidence of Abuse.

Permitting an eight-year-old child to develop a severe case of trench foot is a form of neglect by the parent and such neglect of a child's physical needs is necessarily a form of abuse; hence, a father's perpetration of child abuse by neglect is relevant to a case of sexual abuse against that same child, when both forms of abuse are occurring at the same time. Such evidence is pertinent in that it establishes

an intentional pattern of abusive behavior on the part of the parent toward the child — the first by neglecting her basic hygienic needs and the second by soliciting her to engage in sexual activity. A contemptible lack of caring for a child's essential healthcare needs easily intertwines with sexual abuse of the child; both forms of abuse are intentional and evidence of the lack of care, concern, and respect for the child's well-being is admissible under Evid. Rules 403 and 404(b). *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

Instructions.

Refusal to give the defendant's requested instructions that a parent was not guilty of violation of the law where he merely used bad judgment in the discipline of his children, or that the punishment inflicted upon the child was merely excessive or immoderate held not error. *Wood v. State*, 248 Ark. 109, 450 S.W.2d 537 (1970) (decision under prior law).

5-27-207. Endangering the welfare of a minor in the third degree.

(a)(1) A person commits the offense of endangering the welfare of a minor in the third degree if the person recklessly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of a person known by the actor to be a minor.

(2) As used in this section, "serious harm to the physical or mental welfare" means physical or mental injury that causes:

(A) Protracted disfigurement;

(B) Protracted impairment of physical or mental health; or

(C) Loss or protracted impairment of the function of any bodily member or organ.

(b) Endangering the welfare of a minor in the third degree is a Class B misdemeanor.

History. Acts 2005, No. 2207, § 3.

Publisher's Notes. This section was formerly codified as § 5-27-231.

5-27-208. [Reserved.]

5-27-209. Contributing to the delinquency of a minor.

(a) A person commits the offense of contributing to the delinquency of a minor if, being an adult, the person knowingly aids, causes, or encourages a minor to:

- (1) Do any act prohibited by law;
- (2) Do any act that if done by an adult would render the adult subject to a prosecution for an offense punishable by imprisonment;
- (3) Habitually absent himself or herself, without good or sufficient cause, from the minor's home without the consent of the minor's parent, stepparent, foster parent, guardian, or other lawful custodian;
- (4) Habitually absent himself or herself from school when required by law to attend school; or
- (5) Habitually disobey a reasonable and lawful command of the minor's parent, stepparent, foster parent, guardian, or other lawful custodian.

(b) Contributing to the delinquency of a minor is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2406; A.S.A. 1947, § 41-2406.

Publisher's Notes. This section may be affected by § 5-27-220, which was enacted in the same year.

This section was formerly codified as § 5-27-205.

Cross References. Furnishing deadly weapon to a minor, § 5-73-109.

Selling or giving liquor to minors, §§ 3-3-201 — 3-3-204.

CASE NOTES

Acts Prohibited by Law.

For cases discussing the sale or delivery of liquor to a minor, see *Waller v. State*, 38 Ark. 656 (1882); *State v. Emerick*, 35 Ark. 324 (1880); *Redmond v. State*, 36 Ark. 58 (1880); *Cloud v. State*, 36 Ark. 151 (1880); *Crampton v. State*, 37 Ark. 108 (1881); *Edgar v. State*, 37 Ark. 219 (1881); *Hill v. State*, 37 Ark. 395 (1881); *Pounders v. State*, 37 Ark. 399 (1881); *Robinson v. State*, 38 Ark. 641 (1882); *Waller v. State*, 38 Ark. 656 (1882); *Gillam v. State*, 47 Ark. 555, 2 S.W. 185 (1886); *O'Bryan v. State*, 48 Ark. 42, 2 S.W. 339 (1886);

Mogler v. State, 47 Ark. 109, 14 S.W. 473 (1886); *Ruble v. State*, 51 Ark. 170, 10 S.W. 262 (1889); *Siceluff v. State*, 52 Ark. 56, 11 S.W. 964 (1889); *Wallace v. State*, 54 Ark. 542, 16 S.W. 571 (1891); *Blahut v. State*, 54 Ark. 538, 16 S.W. 582 (1891); *Miller v. State*, 55 Ark. 188, 17 S.W. 719 (1891); *Anderson v. State*, 82 Ark. 405, 101 S.W. 1152 (1907); *Harper v. State*, 91 Ark. 422, 121 S.W. 737 (1909); *Bryant v. State*, 246 Ark. 872, 440 S.W.2d 534 (1969) (preceding decisions under prior law).

Cited: *Palmer v. State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990).

5-27-210. Parental responsibility for student's firearm possession.

(a) As used in this section:

(1) "Firearm" means:

(A) Any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable; or

(B) Components that can readily be assembled into a device described in subdivision (a)(1)(A) of this section; and

(2) "Parent" means a parent, stepparent, legal guardian, or person in loco parentis or who has legal custody of a student pursuant to a court order and with whom the student resides.

(b) A parent of a minor is guilty of a Class B misdemeanor if:

(1) The parent knows that the minor is in illegal possession of a firearm in or upon:

(A) The premises of a public or private school;

(B) A public or private school's athletic stadium or other facility or building in which school-sponsored events are conducted; or

(C) A public park, playground, or civic center; and

(2) The parent fails to:

(A) Prevent the illegal possession; or

(B) Report the illegal possession to an appropriate school or law enforcement official.

History. Acts 1999, No. 1149, §§ 1, 2.

Publisher's Notes. This section was formerly codified as § 5-27-206.

5-27-211 — 5-27-219. [Reserved.]

5-27-220. Contributing to the delinquency of a juvenile.

(a) A person is guilty of a Class A misdemeanor if the person willfully causes, aids, or encourages any minor to do or perform any act which, if done or performed, would make the minor a delinquent juvenile or juvenile in need of supervision within the meaning of this section and the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.

(b) A judge may issue a bench warrant for the arrest of an adult in which there is probable cause to believe the adult is committing an offense under this section, returnable to either the district court or the circuit court of the county where the offense was committed.

(c) Any indictment or information under this section shall state the specific act the defendant is alleged to have committed.

(d)(1) Any person convicted of a violation of this section may be punished as provided for a Class A misdemeanor.

(2) However, the court may suspend or postpone enforcement of any part of the sentence or fine levied under this section if in the judgment of the court the suspension or postponement is in the best interest of the minor that was caused, aided, or encouraged.

History. Acts 1975, No. 451, § 45; A.S.A. 1947, § 45-445; Acts 2005, No. 1994, § 344.

Publisher's Notes. This section may be affected by § 5-27-209 which was enacted in the same year.

Amendments. The 2005 amendment substituted "Arkansas Juvenile Code of 1989, § 9-27-301 et seq." for "§§ 9-27-301

— 9-27-361" in (a); and substituted "as provided for a Class A misdemeanor" for "by imprisonment for not less than sixty (60) days nor more than one (1) year, and by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500)" in (d).

Cross References. Juvenile Code, § 9-27-301 et seq.

5-27-221. Permitting abuse of a minor.

(a) A person commits the offense of permitting abuse of a minor if, being a parent, guardian, or person legally charged with the care or custody of a minor, he or she recklessly fails to take action to prevent the abuse of a minor.

(b) It is a defense to a prosecution for the offense of permitting abuse of a minor if the parent, guardian, or person legally charged with the care or custody of the minor takes immediate steps to end the abuse of the minor, including prompt notification of a medical or law enforcement authority, upon first knowing or having good reason to know that abuse has occurred.

(c) Permitting abuse of a minor is a:

(1) Class B felony if the abuse of the minor:

(A) Consisted of sexual intercourse;

(B) Consisted of deviate sexual activity; or

(C) Caused serious physical injury or death to the minor; or

(2) Class D felony if the abuse of the minor:

(A) Consisted of sexual contact; or

(B) Caused physical injury to the minor.

(d) As used in this section:

(1) "Abuse" means only sexual intercourse, deviate sexual activity, sexual contact, or causing physical injury, serious physical injury, or death, which could be prosecuted as a delinquent or criminal act; and

(2) "Minor" means a person under eighteen (18) years of age.

History. Acts 1985, No. 990, §§ 1-3; A.S.A. 1947, §§ 41-2472 — 41-2474; Acts 1993, No. 1126, § 9; 2001, No. 1374, § 1; 2003, No. 1318, § 1.

Amendments. The 2001 amendment inserted "or she" in (a)(1); substituted "Class B" for "Class C" in (a)(2); and sub-

stituted "Class D Felony" for "Class A Misdemeanor" in (a)(4).

The 2003 amendment substituted "minor" for "child" throughout this section; substituted "abuse of a minor" for "abuse of a child who is less than eleven (11) years old" in (a)(1); and rewrote (b).

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Juvenile Law, 8 UALR L.J. 591.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Crimes Against Children, 26 UALR L.J. 374.

CASE NOTES

Evidence.

Evidence held sufficient to convict mother of battery in the first degree under § 5-13-201(a)(3) for her abuse of a newborn infant and for permitting abuse of a

child under this section. *Reams v. State*, 45 Ark. App. 7, 870 S.W.2d 404 (1994).

Cited: *State v. Watson*, 307 Ark. 333, 820 S.W.2d 59 (1991).

5-27-222. Neglect of minor resulting in delinquency.

A parent or person standing in loco parentis to a minor is guilty of a violation and upon conviction shall be punished by a fine not to exceed two hundred fifty dollars (\$250), if the parent's or person's gross neglect of a parental duty with reference to the minor:

- (1) Proximately results in the delinquency of the minor; or
- (2) Fails to correct the delinquency of the minor.

History. Acts 1963, No. 109, § 1; A.S.A. 1947, § 41-2471; Acts 2005, No. 1994, § 44.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor."

RESEARCH REFERENCES

Ark. L. Rev. Legislative Notes — No. 109 — Juvenile Delinquency — Gross

Neglect of Parental Duty, 18 Ark. L. Rev. 123.

5-27-223. [Repealed.]

A.C.R.C. Notes. Acts 2005, No. 1994, § 536 specifically repealed this section. This section was also amended by Acts 2005, No. 1994, § 44 to change "misdemeanor" to "violation" in former subsection (b).

Publisher's Notes. This section, con-

cerning permitting minors to play in saloons, was repealed by Acts 2005, No. 1994, § 536. The section was derived from Acts 1887, No. 17, §§ 1, 2, p. 18; C. & M. Dig., §§ 2680, 2681; Pope's Dig., §§ 3368, 3369; A.S.A. 1947, §§ 41-2459, 41-2460.

5-27-224. [Repealed.]

A.C.R.C. Notes. Acts 2005, No. 1994, § 537 specifically repealed this section. This section was also amended by Acts 2005, No. 1994, § 44 to change "misdemeanor" to "violation" in former subsection (b).

Publisher's Notes. This section, con-

cerning permitting minors to frequent and play in poolrooms, was repealed by Acts 2005, No. 1994, § 537. The section was derived from Acts 1911, No. 98, §§ 1, 2; C. & M. Dig., § 2682; Pope's Dig., § 3370; A.S.A. 1947, §§ 41-2461, 41-2463.

5-27-225. [Repealed.]

Publisher's Notes. This section, concerning permission for certain minors to participate where both bowling and pool are played, was repealed by Acts 2005, No.

1994, § 538. The section was derived from Acts 1967, No. 422, § 1; A.S.A. 1947, § 41-2462.

5-27-226. [Repealed.]

Publisher's Notes. This section, concerning distinguishing family recreation centers from poolrooms, was repealed by Acts 2005, No. 1994, § 539. The section

was derived from Acts 1967, No. 476, § 1; 1981, No. 526, § 1; A.S.A. 1947, § 41-2464.

5-27-227. Providing minors with tobacco products and cigarette papers — Purchase, use, or possession prohibited — Placement of tobacco vending machines.

- (a) It is unlawful for any person to give, barter, or sell to a minor:
 - (1) Tobacco in any form; or
 - (2) A cigarette paper.
- (b) It is unlawful for any minor:
 - (1) Unless acting as an agent of the minor's employer within the scope of employment, to use or possess:
 - (A) Tobacco in any form; or
 - (B) A cigarette paper;
 - (2) To purchase or attempt to purchase:
 - (A) Tobacco in any form; or
 - (B) A cigarette paper; or
 - (3) For the purpose of obtaining or attempting to obtain tobacco in any form or a cigarette paper, to use any:
 - (A) Falsified identification; or
 - (B) Identification other than his or her own.
- (c)(1) It is not an offense under subdivisions (b)(1) or (2) of this section if a minor was acting at the direction of an employee or authorized agent of a governmental agency authorized to enforce or ensure compliance with a law relating to the prohibition of the sale of tobacco in any form or a cigarette paper to a minor.
- (2) Any minor used in the manner described in subdivision (c)(1) of this section by a governmental agency shall display the appearance of a minor.
- (3)(A) If questioned by a retailer or an agent or employee of a retailer about his or her age, the minor shall state his or her actual age and shall present a true and correct identification if verbally asked to present it.
- (B) If verbally asked for it, any failure on the part of the minor to provide true and correct identification is a defense to any action pursuant to this section or a civil action under § 26-57-257.
- (4) No minor is subject to arrest or search by any law enforcement officer merely on the ground that the minor has or may have possession of tobacco or a cigarette paper.
- (d) No person shall engage or direct a minor to violate any provision of this section for purposes of determining compliance with a provision of this section unless the person has procured the written consent of a parent or guardian of the minor to so engage or direct the minor and the person is:

(1) An officer having authority to enforce a provision of this section;
(2) An employee of the Arkansas Tobacco Control Board or a prosecuting attorney;

(3) An authorized representative of a business acting pursuant to a self-compliance program designed to increase compliance with this section;

(4) An employee or authorized representative of the Department of Health and Human Services; or

(5) An employee or authorized agent of a governmental agency authorized to enforce or ensure compliance with a provision of this section.

(e) Any person who sells tobacco in any form or a cigarette paper has the right to deny the sale of any tobacco in any form or a cigarette paper to any person.

(f) It is unlawful for any person who has been issued a permit or a license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to fail to display in a conspicuous place or on each vending machine a sign indicating that the sale of tobacco products to or purchase or possession of tobacco products by a minor is prohibited by law.

(g) It is unlawful for any manufacturer whose tobacco product is distributed in this state and any person who has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to distribute a free sample of any tobacco product or coupon that entitles the holder of the coupon to any free sample of any tobacco product:

(1) In or on any public street or sidewalk within five hundred feet (500') of any playground, public school, or other facility when the playground, public school, or other facility is being used primarily by minors for recreational, educational, or other purposes; or

(2) To any minor.

(h)(1)(A) Except as provided in subdivision (h)(2) of this section, it is unlawful for any person who owns or leases a tobacco vending machine to place a tobacco vending machine in a public place.

(B) As used in subdivision (h)(1)(A) of this section, "public place" means a publicly or privately owned place to which the public or a substantial number of people have access.

(2) A tobacco vending machine may be placed in a:

(A) Restricted area within a factory, business, office, or other structure to which a member of the general public is not given access;

(B) Permitted premises that has a permit for the sale or dispensing of an alcoholic beverage for on-premises consumption that restrict entry to a person twenty-one (21) years of age or older; or

(C) Place where the tobacco vending machine is under the supervision of the owner or an employee of the owner.

(i)(1) Any retail permit holder or license holder who violates any provision in this section is deemed guilty of a violation and subject to the following penalties:

(A) If the alleged violator has received a notice of an alleged violation from the Arkansas Tobacco Control Board or other agency or official with the authority to assess a penalty containing the information specified in this subchapter, a fine not to exceed two hundred fifty dollars (\$250) for a first violation within a forty-eight month period;

(B) For a second violation within a forty-eight month period:

(i) A fine not to exceed five hundred dollars (\$500); and

(ii) Suspension of the license or permit enumerated in § 26-57-219 for a period not to exceed two (2) days;

(C) For a third violation within a forty-eight month period:

(i) A fine not to exceed one thousand dollars (\$1,000); and

(ii) Suspension of the license or permit enumerated in § 26-57-219 for a period not to exceed seven (7) days;

(D) For a fourth or subsequent violation within a forty-eight month period:

(i) A fine not to exceed two thousand dollars (\$2,000); and

(ii) Suspension of the license or permit enumerated in § 26-57-219 for a period not to exceed fourteen (14) days; and

(E) For a fifth violation within a forty-eight month period, the license or permit enumerated in § 26-57-219 may be revoked.

(2) Upon any revocation or suspension of a permit or license under a provision of subdivision (i)(1) of this section, the person shall not be issued any new permit or license to distribute or sell a tobacco product during the period of suspension or revocation.

(j)(1) A notice of alleged violation of this section shall be given to the holder of a retail permit or license within ten (10) days of the alleged violation.

(2)(A) The notice shall contain the date and time of the alleged violation.

(B)(i) The notice shall also include either the name of the person making the alleged sale or information reasonably necessary to determine the location in the store that allegedly made the sale.

(ii) When appropriate, information under subdivision (j)(2)(B)(ii) should include, but not be limited to, the:

(a) Cash register number;

(b) Physical location of the sale in the store; and

(c) If possible, the lane or aisle number.

(k) Notwithstanding the provisions of subsection (i) of this section, the court shall consider the following factors when reviewing a possible violation:

(1) The business has adopted and enforced a written policy against selling cigarettes or tobacco products to minors;

(2) The business has informed its employees of the applicable laws regarding the sale of cigarettes and tobacco products to minors;

(3) The business has required employees to verify the age of a cigarette or tobacco product customer by way of photographic identification;

(4) The business has established and imposed disciplinary sanctions for noncompliance; and

(5) That the appearance of the purchaser of the tobacco in any form or cigarette papers was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase.

(l) Any cigarette or tobacco product found in the possession of a minor may be confiscated.

(m) An employee of a permit holder who violates § 5-27-227 is subject to a fine not to exceed one hundred dollars (\$100) per violation.

(n) A person convicted of violating any provision of this section whose permit or license to distribute or sell a tobacco product is suspended or revoked upon conviction shall surrender to the court any permit or license to distribute or sell a tobacco product and the court shall transmit the permit or license to distribute or sell a tobacco product to the Director of the Department of Finance and Administration and instruct the Director of the Arkansas Tobacco Control Board:

(1) To suspend or revoke the person's permit or license to distribute or sell a tobacco product and to not renew the permit or license; and

(2) Not to issue any new permit or license to that person for the period of time determined by the court in accordance with this section.

History. Acts 1929, No. 152, § 26; Pope's Dig., § 13557; A.S.A. 1947, § 41-2465; Acts 1991, No. 543, § 1; 1997, No. 1337, § 24; 1999, No. 1591, §§ 1, 3; 2003, No. 846, § 1.

Amendments. The 2003 amendment,

in (f), substituted "in a conspicuous place or on" for "prominently at each retail sales counter or" and "indicating that the sale of tobacco ... is prohibited by law" for "that meets the following requirements"; and deleted former (f)(1) and (f)(2).

CASE NOTES

Cited: Wometco Servs., Inc. v. Gaddy, 272 Ark. 452, 616 S.W.2d 466 (1981); Ark. Tobacco Control Bd. v. Santa Fe Natural

Tobacco Co., — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 765 (Dec. 9, 2004).

5-27-228. [Repealed.]

Publisher's Notes. This section, concerning tattooing a minor without parental consent, was repealed by Acts 2001, No. 414, § 2. The section was derived

from Acts 1957, No. 277, §§ 1-3; A.S.A. 1947, §§ 41-2468 — 41-2470.

For present law, see § 20-27-1502.

5-27-229. Soliciting money or property from incompetents.

(a) It is unlawful for any person to:

(1) Solicit money or property from another person the person knows or should have reason to know is an incompetent person or is a person with diminished mental capacity; and

(2) Cause that incompetent person or person with diminished mental capacity to voluntarily surrender money or property in order to profit or secure gain by taking unfair advantage of the person's incompetency or diminished mental capacity.

(b) Any person violating this section is guilty of a Class D felony.

History. Acts 1987, No. 337, § 1.

5-27-230. Exposing a child to a chemical substance or methamphetamine.

- (a) As used in this section:
- (1)(A) “Chemical substance” means a substance intended to be used as a precursor in the manufacture of methamphetamine, or any other chemical intended to be used in the manufacture of methamphetamine.
 - (B) Intent may be demonstrated by the substance’s:
 - (i) Use;
 - (ii) Quantity;
 - (iii) Manner of storage; or
 - (iv) Proximity to another precursor or equipment used to manufacture methamphetamine;
 - (2) “Child” means any person under eighteen (18) years of age; and
 - (3) “Methamphetamine” has the same meaning as provided in the Uniform Controlled Substances Act, § 5-64-101 et seq.
- (b)(1) Any adult who, with the intent to manufacture methamphetamine, knowingly causes or permits a child to be exposed to, ingest, inhale, or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony.
- (2) Any adult who violates subdivision (b)(1) of this section is guilty of a Class B felony if a child suffers physical injury or serious physical injury because of the violation.

History. Acts 2003, No. 930, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Law, Controlled Substances, 26 UALR Arkansas General Assembly, Criminal L.J. 366.

5-27-231, 5-27-232. [Transferred.]

Publisher’s Notes. Former § 5-27-231 has been renumbered as § 5-27-307. Former § 5-27-232 has been renumbered as § 5-27-303.

SUBCHAPTER 3 — ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979

SECTION.	SECTION.
5-27-301. Title.	or print medium depicting sexually explicit conduct involving a child.
5-27-302. Definitions.	
5-27-303. Engaging children in sexually explicit conduct for use in visual or print medium.	5-27-305. Transportation of minors for prohibited sexual conduct.
5-27-304. Pandering or possessing visual	5-27-306. Internet stalking of a child.

Cross References. Sexual indecency with a child, § 5-14-110.

RESEARCH REFERENCES

ALR. Statutes or ordinances regulating sexual performance by child. 21 ALR 4th 239.

5-27-301. Title.

This subchapter may be cited as the “Arkansas Protection of Children Against Exploitation Act of 1979”.

History. Acts 1979, No. 499, § 1; A.S.A. 1947, § 41-4201.

5-27-302. Definitions.

As used in this subchapter:

- (1) “Child” means any person under seventeen (17) years of age;
- (2) “Commercial exploitation” means having monetary or other material gain as a direct or indirect goal.
- (3) “Producing” means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) “Sexually explicit conduct” means actual or simulated:
 - (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) Bestiality;
 - (C) Masturbation;
 - (D) Sadoomasochistic abuse for the purpose of sexual stimulation;or
- (E) Lewd exhibition of:
 - (i) The genitals or pubic area of any person; or
 - (ii) The breast of a female; and
- (5) “Visual or print medium” means any film, photograph, negative, slide, book, magazine, or other visual or print medium other than material specifically used by a licensed medical and/or mental health professional for the purpose of assessment, evaluation, and treatment of a sex offender.

History. Acts 1979, No. 499, § 2; A.S.A. 1947, § 41-4202; Acts 1995, No. 1209, § 1.

CASE NOTES

ANALYSIS

Construction.
Minors.
Producing.

Construction.

Because a comma was placed after “advertising” in subdivision (3) of this section, the legislature clearly intended “pecuniary profit” to modify not just advertising, but also producing, directing, manufacturing, issuing, and publishing. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993) (decision under prior law).

Minors.

It did not violate equal protection to prosecute the defendants under the federal Child Protection Act, even though the

act defines “minor” as one under 18 years of age, whereas this section defines “child” (“minor”) as one under 16 years of age. *United States v. Freeman*, 808 F.2d 1290 (8th Cir. 1987), cert. denied, 480 U.S. 922, 107 S. Ct. 1384, 94 L. Ed. 2d 697 (1987) (decision under prior law).

Producing.

The comma after the word “advertising” in subdivision (3) of this section means that “for pecuniary profit” is a required element of proof of “producing” as that term is used in § 5-27-303. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993) (decision under prior law).

Cited: *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

5-27-303. Engaging children in sexually explicit conduct for use in visual or print medium.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any child to engage in or who has a child assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct is guilty of a:

- (1) Class B felony for the first offense; and
- (2) Class A felony for a subsequent offense.

(b) Any parent, legal guardian, or person having custody or control of a child who knowingly permits the child to engage in or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct is guilty of a:

- (1) Class B felony for the first offense; and
- (2) Class A felony for a subsequent offense.

History. Acts 1979, No. 499, § 3; A.S.A. 1947, § 41-4203; Acts 2003, No. 1087, § 1.
Amendments. The 2003 amendment

in (a) and (b), substituted “Class B” for “Class C” and “Class A” for “Class B”; and made minor stylistic changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

CASE NOTES

ANALYSIS

Evidence.
Producing.

Evidence.

Substantial evidence existed from which the jury could conclude that defendants, husband and wife, permitted their child to engage in sexually explicit conduct for the use in visual or print medium and that defendant husband produced, directed, or promoted a sexual performance; the videotapes showed full frontal nudity of the child, who was no more than

13 years old, and the scenes depicted were lewd. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

Producing.

The comma after the word "advertising" in § 5-27-302(3) means that "for pecuniary profit" (deleted from the end of (3) in 1995) is a required element of proof of "producing" as that term is used in this section. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993) (decision under prior law).

Cited: *Watson v. State*, 313 Ark. 304, 854 S.W.2d 332 (1993).

5-27-304. Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child.

(a) With knowledge of the character of the visual or print medium involved, no person shall do any of the following:

(1) Knowingly advertise for sale or distribution, sell, distribute, transport, ship, exhibit, display, or receive for the purpose of sale or distribution any visual or print medium depicting a child participating or engaging in sexually explicit conduct; or

(2) Knowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct.

(b) Any person who violates subdivisions (a)(1) or (2) of this section is guilty of a:

(1) Class C felony for the first offense; and

(2) Class B felony for a subsequent offense.

History. Acts 1979, No. 499, § 4; A.S.A. 1947, § 41-4204; Acts 1991, No. 607, § 1.

Publisher's Notes. Acts 1991, No. 607, § 2, provided: "It is the express intent of this act to eradicate the use of children as subjects of pornographic materials. This act seeks to protect victims of child pornography and to destroy a market for the exploitative use of children. The use of children as subjects of pornographic material is harmful to the physical and psychological health of children. Thus, this state has a compelling interest in penalizing those who solicit, receive, purchase, exchange, possess, view, distribute or control such material.

"Additionally, advertising, selling and distributing child pornography provides an economic motive for the production of such material. In penalizing the posses-

sion and marketing of child pornography, it is the intent of this act to significantly decrease production of, and demand for, the material.

"Similar legislation has been approved in several states and has been upheld by the United States Supreme Court. *Osborne v. Ohio*, 58 U.S.L.W. 4467 (U.S. April 18, 1990) (No. 88-5968); *New York v. Ferber*, 458 U.S. 747 (1982). See also Ala. Code 13A-12-192 (1988); Ariz. Rev. Stat. Ann. 13-2552 (1989); Colo. Rev. Stat. 18-6-403 (Supp. 1989); Fla. Stat. 827.071 (1989); Ga. Code Ann. 16-12-100 (1989); Idaho Code 18-1507 (1987); Ill. Rev. Stat., ch. 38, P. 11-20-.1 (1987); Kans. Stat. Ann. 21-3516 (Supp. 1989); Minn. Stat. 617.247 (1988); Mo. Rev. Stat. 573.037 (Supp. 1989); Neb. Rev. Stat. 28-809 (1989); Nev. Rev. Stat. 200.730 (1987); Ohio Rev. Code

Ann. 2907.322 and 2907.323 (Supp. 1989);
Okla. Stat., Tit. 21, 1021.2 (Supp. 1989);
S.D. Comp. Laws Ann. 22-22-23-1, 22-22-
23.1 (1988); Tex. Penal Code Ann. 43.26

(1989 & Supp. 1989-1990); Utah Code
Ann. 76-5a-3(1)(a) (Supp. 1989); Wash.
Rev. Code 9.68A.070 (1989); W. Va. Code
61-8C-3 (1989)."

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 14
UALR L.J. 753.

CASE NOTES

ANALYSIS

Evidence.
Jurisdiction.

Evidence.

In a prosecution arising from the defendant's possession of videotapes of two 14 year old girls that included full frontal nudity, the evidence was sufficient to support a conviction, notwithstanding the defendant's assertion that the videotapes did not include sexually explicit conduct, since the scenes depicted on the videotapes were at the very least indecent and, therefore, "lewd" as contemplated by § 5-27-401(3). *Gabrion v. State*, 73 Ark. App. 170, 42 S.W.3d 572 (2001).

Where defendant possessed CD-ROMs showing a 14- and a 15-year-old girl dancing and posing provocatively in the nude, and the pictures were accompanied by labels characterizing the pictures in obscene terms, the evidence was sufficient to convict defendant of the knowing possession of a visual medium depicting a child engaging in sexually explicit conduct in violation of subdivision (a)(2). *George v. State*, 84 Ark. App. 275, 140 S.W.3d 492 (2003).

Evidence was sufficient to sustain defendant's convictions of possession of visual or print medium depicting sexually explicit conduct where the images in defendant's possession constituted "sexually explicit conduct"; there were images containing the bare breasts of 14 year-old girls, and the girls were photographed in sexually suggestive positions. *George v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 411 (June 24, 2004), cert. denied, — U.S. —, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

Jurisdiction.

There was jurisdiction to try and convict defendant of pandering, pursuant to subsection (a) of this section, where he emailed photographs of himself, nude, and other minors engaging in sexual activities from his home in another state into an address in Arkansas; there was jurisdiction pursuant to § 5-1-104(a)(1) because defendant's conduct as well as the result of his conduct occurred within Arkansas, where the photos were received. *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003).

5-27-305. Transportation of minors for prohibited sexual conduct.

Any person is guilty of a Class C felony who transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, if the actor:

- (1) Knows or has reason to know that prohibited sexual conduct will be commercially exploited by any person; and
- (2) Intends that the minor engage in:

(A) Prostitution; or

(B) Prohibited sexual conduct.

History. Acts 1979, No. 499, § 5;
A.S.A. 1947, § 41-4205.

5-27-306. Internet stalking of a child.

(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:

(1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity as defined in § 5-14-101;

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity as defined in § 5-14-101;

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity as defined in § 5-14-101; or

(4) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) Sexual intercourse;

(B) Sexually explicit conduct; or

(C) Deviate sexual activity as defined in § 5-14-101;

(b) Internet stalking of a child is a:

(1) Class C felony if the person attempts to arrange a meeting with a child fifteen (15) years of age or younger, even if a meeting with the child never takes place; or

(2) Class C felony if the person attempts to arrange a meeting with an individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the individual never takes place; or

(3) Class A felony if the person arranges a meeting with a child fifteen (15) years of age or younger and an actual meeting with the child

takes place, even if the person fails to engage the child in any sexual activity.

(c) This section does not apply to a person or entity providing an electronic communications service to the public that is used by another person to violate this section, unless the person or entity providing an electronic communications service to the public:

- (1) Conspires with another person to violate this section; or
- (2) Knowingly aids and abets a violation of this section.

History. Acts 2005, No. 1776, § 1.

SUBCHAPTER 4 — USE OF CHILDREN IN SEXUAL PERFORMANCES

SECTION.	SECTION.
5-27-401. Definitions.	moting a sexual performance by a child.
5-27-402. Employing or consenting to the use of a child in a sexual performance.	5-27-404. Good faith defense.
5-27-403. Producing, directing, or pro-	5-27-405. Determination of age of person.

Cross References. Sexual indecency with a child, § 5-14-110.

RESEARCH REFERENCES

ALR. Statutes or ordinances regulating sexual performance by child. 21 ALR 4th 239.

CASE NOTES

Purpose.

The intent of the General Assembly was specifically to prohibit the exploitation of

children in commercial pornographic stage productions. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993).

5-27-401. Definitions.

As used in this subchapter:

- (1) “Deviate sexual intercourse” means any act of sexual gratification involving:
- (A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;
- (2) “Performance” means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or a part of a play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation, whether:

- (A) Performed live or photographed;
- (B) Filmed;
- (C) Videotaped; or
- (D) Visually depicted by any other photographic, cinematic, magnetic, or electronic means;

(3) "Promote" means to:

(A) Sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise; or

(B) Offer or agree to sell, give, provide, distribute, circulate, disseminate, present, exhibit, or advertise;

(4) "Sodomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in an undergarment or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context;

(5) "Sexual conduct" means:

(A) Actual or simulated sexual intercourse;

(B) Deviate sexual activity;

(C) Sexual bestiality;

(D) Masturbation;

(E) Sodomasochistic abuse; or

(F) Lewd exhibition of the genitals or pubic area of any person or a breast of a female; and

(6) "Sexual performance" means any performance or part of a performance that includes sexual conduct by a child under seventeen (17) years of age.

History. Acts 1983, No. 451, § 1;
A.S.A. 1947, § 41-4206; Acts 1995, No.
337, § 1; 1995, No. 1209, § 2.

CASE NOTES

ANALYSIS

Performance.

Sufficiency of the evidence.

Performance.

The fact that the definition of "performance" in subdivision (1) of this section requires an exhibition of the work before an audience of at least two persons indicates that the legislators had in mind some form of public display rather than a private recording of sexual intimacies between participating parties. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993) (decision under prior law).

The definition of "performance" set forth in subdivision (1) of this section requires the state to prove that the sexual performance was exhibited to two or more view-

ers. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993) (decision under prior law).

Sufficiency of the Evidence.

Substantial evidence existed from which the jury could conclude that defendants, husband and wife, permitted their child to engage in sexually explicit conduct for the use in visual or print medium and that defendant husband produced, directed, or promoted a sexual performance; the videotapes showed full frontal nudity of the child, who was no more than 13 years old, and the scenes depicted were lewd. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003).

Evidence was sufficient to sustain defendant's convictions of possession of visual or print medium depicting sexually

explicit conduct where the images in defendant's possession constituted "sexually explicit conduct"; there were images containing the bare breasts of 14 year-old girls, and the girls were photographed in

sexually suggestive positions. *George v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 411 (June 24, 2004), cert. denied, — U.S. —, 125 S. Ct. 1329, 161 L. Ed. 2d 136 (2005).

5-27-402. Employing or consenting to the use of a child in a sexual performance.

(a) It is unlawful for any person, knowing the character and content of the performance, to employ, authorize, or induce a child under seventeen (17) years of age to engage in a sexual performance.

(b) It is also unlawful for a parent or legal guardian or custodian of a child under seventeen (17) years of age to consent to the participation by the child in a sexual performance.

(c) Any person violating this section is guilty of a:

- (1) Class C felony for the first offense; and
- (2) Class B felony for a subsequent offense.

History. Acts 1983, No. 451, § 2; A.S.A. 1947, § 41-4207.

CASE NOTES

Evidence.

Where there was no proof that two or more persons were watching during the showing of a videotape containing sexual

conduct by a child, the evidence was held insufficient to sustain a conviction under this section. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993).

5-27-403. Producing, directing, or promoting a sexual performance by a child.

(a) It is unlawful for any person, knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under seventeen (17) years of age.

(b) Any person violating this section is guilty of a Class B felony.

History. Acts 1983, No. 451, § 3; A.S.A. 1947, § 41-4208.

5-27-404. Good faith defense.

It is an affirmative defense to a prosecution under this subchapter that the defendant in good faith reasonably believed that the person who engaged in the sexual conduct was seventeen (17) years of age or older.

History. Acts 1983, No. 451, § 4; A.S.A. 1947, § 41-4209.

CASE NOTES

Cited: *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993).

5-27-405. Determination of age of person.

When it becomes necessary for purposes of this subchapter to determine whether a person who participated in sexual conduct was a child under seventeen (17) years of age, the court or jury may make this determination by any of the following methods:

- (1) Personal inspection of the person;
- (2) Inspection of the photograph or motion picture that shows the person engaging in the sexual performance;
- (3) Oral testimony by a witness to the sexual performance as to the age of the person based on the person's appearance at the time;
- (4) Expert medical testimony based on the appearance of the person engaged in the sexual performance; or
- (5) Any other method authorized by law.

History. Acts 1983, No. 451, § 5;
A.S.A. 1947, § 41-4210.

SUBCHAPTER 5 — FRAUDULENT IDENTIFICATION DOCUMENTS FOR MINORS

SECTION.

5-27-501. Purposes.

5-27-502. Manufacturing or altering personal identification document unlawful.

SECTION.

5-27-503. Possession of fraudulent or altered personal identification document unlawful.

5-27-504. Denial of driving privileges.

5-27-501. Purposes.

(a) The primary purpose of this subchapter is to prohibit the production, sale, or distribution of a fraudulent or altered identification document to a person under twenty-one (21) years of age to prevent the use of the fraudulent or altered identification document to unlawfully purchase an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law.

(b) The secondary purpose of this subchapter is to assign criminal liability to a person under twenty-one (21) years of age utilizing a fraudulent identification document for the purpose of unlawfully purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law.

History. Acts 1991, No. 567, § 1.

5-27-502. Manufacturing or altering personal identification document unlawful.

- (a) It is unlawful for a person to:

(1) Manufacture or produce a fraudulent personal identification document for the purpose of providing a person under twenty-one (21) years of age identification that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law;

(2) Alter a personal identification document for the purpose of providing a person under twenty-one (21) years of age false identification that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law; or

(3) Sell or otherwise distribute a fraudulent personal identification document described in this subsection to a person under twenty-one (21) years of age.

(b)(1) A person who violates this section is deemed guilty of a Class C felony.

(2) A subsequent violation of this section is a Class B felony.

History. Acts 1991, No. 567, § 2.

5-27-503. Possession of fraudulent or altered personal identification document unlawful.

(a) It is unlawful for:

(1) A person to possess a fraudulent or altered personal identification document for the purpose of providing a person under twenty-one (21) years of age identification that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law;

(2) A person under twenty-one (21) years of age to possess a fraudulent or altered personal identification document that can be used for the purpose of purchasing an alcoholic beverage or other substance or material restricted for adult purchase or possession in accordance with existing law; or

(3) A person under twenty-one (21) years of age to attempt to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law.

(b)(1)(A) If a seller of alcoholic beverages or the seller's employee has reasonable cause to believe that a person has violated subdivision (a)(3) of this section, the person may be detained in a reasonable manner and for a reasonable length of time by the seller of alcoholic beverages or the seller's employee in order that the seller of alcoholic beverages or the seller's employee may call for a certified law enforcement officer to conduct an investigation.

(B) The detention authorized under subdivision (b)(1)(A) of this section does not include a physical detention.

(2) If the seller of alcoholic beverages or the seller's employee attempts to verify the age of the person attempting to purchase an

alcoholic beverage by way of photographic identification and complies with subdivision (b)(1) of this section, the detention by a seller of alcoholic beverages or the seller's employee does not render the seller of alcoholic beverages or the seller's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(3) After conducting an investigation under subdivision (b)(1)(A) of this section and within twenty-four (24) hours of the call from a seller of alcoholic beverages or the seller's employee for the investigation, a certified law enforcement officer may arrest a person without a warrant upon probable cause for believing that the person has violated subdivision (a)(3) of this section.

(c)(1) A person who violates this section is deemed guilty of a Class B misdemeanor.

(2) A subsequent violation of this section is a Class A misdemeanor.

History. Acts 1991, No. 567, § 3; 2005, inserted present (b); and inserted "purchase alcoholic beverages or" in present No. 1976, § 1.

Amendments. The 2005 amendment (a)(3).

5-27-504. Denial of driving privileges.

(a)(1) If a minor pleads guilty, nolo contendere, or is found guilty of violation of § 5-27-503, or is found by a juvenile division of circuit court to have committed a violation of § 5-27-503, the court shall prepare and transmit to the Department of Finance and Administration within twenty-four (24) hours after the plea or finding an order of denial of driving privileges for the minor.

(2) In a case of extreme and unusual hardship, the order may provide for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(b) Upon receipt of an order of denial of driving privileges under this subchapter, the department shall suspend the motor vehicle operator's license of the minor for twelve (12) months or until the minor reaches eighteen (18) years of age, whichever period of time is shortest.

(c) A penalty prescribed in this section is in addition to a penalty prescribed by § 5-27-503.

History. Acts 1991, No. 567, § 4.

SUBCHAPTER 6 — COMPUTER CRIMES AGAINST MINORS

SECTION.

5-27-601. Definitions.

5-27-602. Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child.

5-27-603. Computer child pornography.

5-27-604. Failure to report computer child pornography.

SECTION.

5-27-605. Computer exploitation of a child.

5-27-606. Jurisdiction.

5-27-607. Determination of age of person.

5-27-608. Applicability of this subchapter to interactive computer service and electronic mail service providers.

Cross References. Unlawful computer crimes, § 5-41-201 et seq.

5-27-601. Definitions.

As used in this subchapter:

- (1) "Child" means any person under seventeen (17) years of age;
- (2)(A) "Computer" means an electronic, magnetic, electrochemical, or other high-speed data processing device performing a logical, arithmetic, or storage function and includes any data storage facility or communications facility directly related to or operating in conjunction with the device.
(B) "Computer" also includes any online service, internet service, or local bulletin board, any electronic storage device, including a floppy disk or other magnetic storage device, or any compact disk that has read-only memory and the capacity to store audio, video, or written material;
- (3) "Computer network" means an interconnection of a communications line with a computer through a remote terminal or a complex consisting of two (2) or more interconnected computers;
- (4) "Computer program" means a set of instructions, statements, or related data that, in actual or modified form, is capable of causing a computer or a computer system to perform a specified function;
- (5) "Computer software" means one (1) or more computer programs, existing in any form, or any associated operational procedure, manual, or other documentation;
- (6) "Computer system" means a set of related, connected, or unconnected computers, other devices, and software;
- (7) "Deviate sexual activity" means any act involving the penetration, however slight, of the:
 - (A) Anus or mouth of a person by the penis of another person; or
 - (B) Labia majora or anus of a person by any body member or foreign instrument manipulated by another person;
- (8) "Electronic mail" means an electronic message, file, data, or other information that is transmitted:
 - (A) Between two (2) or more computers, computer networks, or electronic terminals; or
 - (B) Within or between computer networks;
- (9) "Electronic mail service provider" means a person that:
 - (A) Is an intermediary in the transmission of electronic mail from the sender to the recipient; or
 - (B) Provides to an end user of electronic mail service the ability to send and receive electronic mail;
- (10) "Interactive computer service" means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and also a system operated or service offered by a library or educational institution;

(11) "Internet" means the international computer network of both federal and nonfederal interoperable packet switched data networks;

(12) "Performance" means any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or a part, whether:

(A) Performed live or photographed;

(B) Filmed;

(C) Videotaped; or

(D) Visually depicted by any other photographic, cinematic, magnetic, or electronic means;

(13) "Reproduction" includes, but is not limited to, a computer-generated image;

(14) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis; and

(15) "Sexually explicit conduct" means actual or simulated:

(A) Sexual intercourse;

(B) Deviate sexual activity;

(C) Bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse for the purpose of sexual stimulation;

or

(F) Lewd exhibition of the:

(i) Genitals or pubic area of any person; or

(ii) Breast of a female.

History. Acts 2001, No. 1496, § 1; inserted present (8)-(10) and redesignated 2003, No. 1087, § 2. former (8)-(12) as present (11)-(15) in alphabetical order.

Amendments. The 2003 amendment

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

5-27-602. Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child.

(a) A person commits distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child if the person knowingly:

(1) Receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct; or

(2) Possesses or views through any means, including on the internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.

(b) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child is a:

- (1) Class C felony for the first offense; and
- (2) Class B felony for any subsequent offense.

(c) It is an affirmative defense to a prosecution under this section that the defendant in good faith reasonably believed that the person depicted in the matter was seventeen (17) years of age or older.

History. Acts 2001, No. 1496, § 1; rates the image of a child” and made minor stylistic changes.
2003, No. 1087, § 3; 2005, No. 1994, § 492.

Amendments. The 2003 amendment, in (a)(1) and (a)(2), inserted “or computer-generated image” following “computer program or file” in (a)(1).
The 2005 amendment deleted “computer-generated image” following “computer program or file” in (a)(1).

5-27-603. Computer child pornography.

(a) A person commits computer child pornography if the person knowingly:

(1) Compiles, enters into, or transmits by means of computer, makes, prints, publishes, or reproduces by other computerized means, knowingly causes or allows to be entered into or transmitted by means of computer or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any child or another individual believed by the person to be a child, or the visual depiction of the conduct; or

(2) Utilizes a computer online service, internet service, or local bulletin board service to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct.

(b) Computer child pornography is a Class B felony.

History. Acts 2001, No. 1496, § 1.

RESEARCH REFERENCES

ALR. Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution. 98 ALR 5th 167.

5-27-604. Failure to report computer child pornography.

(a) A person commits failure to report computer child pornography if the person:

(1) Is the owner, operator, or employee of a computer online service, internet service, or bulletin board service; and

(2) Knowingly fails to notify a law enforcement official that a subscriber is using the computer online service, internet service, or bulletin board service to commit a violation of § 5-27-603.

(b) Failure to report computer child pornography is a Class A misdemeanor.

History. Acts 2001, No. 1496, § 1.

5-27-605. Computer exploitation of a child.

(a)(1) A person commits computer exploitation of a child in the first degree if the person:

(A) Causes or permits a child to engage in sexually explicit conduct; and

(B) Knows, has reason to know, or intends that the prohibited conduct may be:

(i) Photographed;

(ii) Filmed;

(iii) Reproduced;

(iv) Reconstructed in any manner, including on the internet; or

(v) Part of an exhibition or performance.

(2) Computer exploitation of a child in the first degree is a:

(A) Class B felony for the first offense; and

(B) Class A felony for a subsequent offense.

(b)(1) A person commits computer exploitation of a child in the second degree if the person:

(A) Photographs or films a child engaged in sexually explicit conduct; or

(B) Uses any device, including a computer, to reproduce or reconstruct the image of a child engaged in sexually explicit conduct.

(2) Computer exploitation of a child in the second degree is a Class C felony.

History. Acts 2001, No. 1496, § 1; (a)(2)(A); in (a)(2)(B), substituted "Class A" for "Class B" and inserted "offense"; 2003, No. 1087, § 4.

Amendments. The 2003 amendment substituted "Class B" for "Class C" in deleted former (a)(3); and, in (b)(2), substituted "Class C" for "Class D."

5-27-606. Jurisdiction.

For the purpose of determining jurisdiction, a person is subject to prosecution in this state for any conduct proscribed by this subchapter if the transmission that constitutes the offense either originates in this state or is received in this state.

History. Acts 2001, No. 1496, § 1.

5-27-607. Determination of age of person.

(a) For purposes of this subchapter, the state must prove beyond a reasonable doubt that a person who is depicted as or presents the appearance of being under seventeen (17) years of age in any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction is under seventeen (17) years of age.

(b) If it becomes necessary for a purpose of this subchapter to determine whether a person depicted engaging in sexually explicit conduct was under seventeen (17) years of age, the court or jury may make this determination by any of the following methods:

(1) Personal inspection of the person;

(2) Inspection of the photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction picture that depicts the person engaging in the sexually explicit conduct;

(3) Expert medical testimony based on the appearance of the person engaged in the sexually explicit conduct; or

(4) Any other method authorized by law.

History. Acts 2001, No. 1496, § 1; deleted “computer-generated image” following “computer program or file” in (a) 2005, No. 1994, § 493.

Amendments. The 2005 amendment and (b)(2).

5-27-608. Applicability of this subchapter to interactive computer service and electronic mail service providers.

An interactive computer service or electronic mail service provider does not violate this subchapter when the interactive computer service or electronic mail service provider is an intermediary between the sender and the recipient in the transmission of an electronic mail that violates this subchapter.

History. Acts 2003, No. 1087, § 5.

CHAPTER 28

ABUSE OF ADULTS

SUBCHAPTER

1. GENERAL PROVISIONS.
2. REPORTING. [REPEALED AND TRANSFERRED.]
3. PROTECTIVE PLACEMENT AND CUSTODY. [REPEALED.]

RESEARCH REFERENCES

ALR. Penal statute prohibiting abuse of persons. 1 ALR 4th 38.

Battered parent syndrome: expert testimony. 43 ALR 4th 1203.

Ark. L. Rev. Killenbeck, Nothing That We Can Do? Or, Much Ado About Nothing? Some Thoughts on *Bates v. Bates*, Equity,

and Domestic Abuse in Arkansas, 43 Ark. L. Rev. 752.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-28-101. Definitions.
- 5-28-102. Legislative intent.
- 5-28-103. Criminal penalties for abuse of an endangered or impaired person.
- 5-28-104. Privilege not grounds for exclusion of evidence.
- 5-28-105. Spiritual treatment alone not abusive.

SECTION.

- 5-28-106. [Repealed.]
- 5-28-107. Investigation by Attorney General and Department of Health and Human Services.
- 5-28-108. Special deputy prosecutor.
- 5-28-109. [Repealed.]
- 5-28-110. Penalties for violation of § 12-1601 et seq.

Cross References. Assault and battery, § 5-13-201 et seq.

Criminal History for Volunteers Act, § 12-12-1601 et seq.

Endangering welfare of incompetent person in the first degree, § 5-27-201.

Endangering welfare of incompetent person in second degree, § 5-27-202.

Endangering welfare of a minor in the first degree, § 5-27-203.

Effective Dates. Acts 1988 (4th Ex. Sess.), No. 5, § 6, and No. 15, § 6: July 15, 1988. Emergency clause provided: "It is hereby found and determined by the General Assembly that during recent months, certain inadequacies in the continuum of health care for the older citizens of this State have been brought to the attention of the General Assembly; that this Act is necessary to assure each citizen of this State in need of long-term care that a high quality of care at affordable cost will be provided; that the older citizenry of this State deserve the best possible care; that the immediate passage of this Act is essential to the health, welfare and safety of the citizens of the State of Arkansas and to avoid irreparable harm upon the proper administration of an essential government program. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1292, § 11: Apr. 22, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Attorney General and the prosecuting attorneys are in need of specific legislation by which to protect endangered adults in the State of Arkansas and that immediate passage of this act is necessary for that purpose. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 1162, § 2: Apr. 8, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Adult Abuse Statute is in immediate need of a revision to clarify an ambiguity in the law; and that the provisions of this act are essential to successful operations and activities of the Medicaid Fraud Control Unit and the Department of Human Services. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-28-101. Definitions.

As used in this chapter:

(1) "Abuse" means:

(A) Any purposeful and unnecessary physical act that inflicts pain on or causes injury to an endangered person or an impaired person;

(B) Any purposeful or demeaning act that a reasonable person would believe subjects an endangered person or an impaired person, regardless of age, ability to comprehend, or disability, to ridicule or psychological injury in a manner likely to provoke fear or alarm;

(C) Any purposeful threat that a reasonable person would find credible and nonfrivolous to inflict pain on or cause injury to an endangered person or an impaired person except in the course of medical treatment or for justifiable cause; or

(D) With regard to any adult long-term care facility resident by a caregiver, any purposeful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish;

(2) "Adult maltreatment" means adult abuse, exploitation, neglect, physical abuse, or sexual abuse;

(3) "Caregiver" means a related or unrelated person, owner, agent, high managerial agent of a public or private organization, or a public or private organization that has the responsibility for the protection, care, or custody of an adult endangered person or an adult impaired person as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court;

(4) "Endangered person" means:

(A) An adult who:

(i) is found to be in a situation or condition that poses an imminent risk of death or serious bodily harm to the adult; and

(ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition; or

(B) A long-term care facility resident who:

(i) Is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to the person; and

(ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition;

(5) "Exploitation" means:

(A) The illegal or unauthorized use or management of an an adult endangered person's or an adult impaired person's funds, assets, or property or the use of an adult endangered person's or an adult impaired person's, power of attorney, or guardianship for the profit or advantage of the actor or another person; or

(B) Misappropriation of property of an adult long-term care facility resident which means the deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of an adult long-term care facility resident's belongings or money without the adult long-term care facility resident's consent;

(6) "Imminent danger to health or safety" means a situation in which death or severe bodily injury could reasonably be expected to occur without intervention;

(7)(A) "Impaired person" means a person eighteen (18) years of age or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation, and as a consequence of this inability to protect himself or herself is endangered.

(B) For purposes of this chapter, a long-term care facility resident is presumed to be an "impaired person";

(8) "Long-term care facility" means:

(A) A nursing home;

(B) A residential care facility;

(C) A post-acute head injury retraining and residential facility;

(D) Any facility that provides long-term medical or personal care;

(E) An intermediate care facility for the mentally retarded; or

(F) An assisted-living facility;

(9) "Long-term care facility resident" means a person, regardless of age, living in a long-term care facility;

(10) "Long-term care facility resident maltreatment" means abuse, exploitation, neglect, physical abuse, or sexual abuse of a long-term care facility resident;

(11) "Neglect" means:

(A) An act or omission by an endangered person or an impaired person, for example, self-neglect; or

(B) A purposeful act or omission by a caregiver responsible for the care and supervision of an adult endangered person or an adult impaired person that constitutes negligently failing to:

(i) Provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person;

(ii) Report a health problem or a change in a health problem or a change in the health condition of an adult endangered person or an adult impaired person to the appropriate medical personnel;

(iii) Carry out a prescribed treatment plan; or

(iv) Provide a good or service necessary to avoid physical harm, mental anguish, or mental illness as defined in regulations promulgated by the Office of Long-Term Care of the Division of Medical Services of the Department of Health and Human Services to an adult long-term care facility resident;

(12) "Physical injury" means the:

(A) Impairment of a physical condition; or

(B) Infliction of substantial pain;

(13) "Serious bodily harm" means:

(A) Physical abuse;

(B) Sexual abuse;

(C) Physical injury; or

(D) Serious physical injury as defined in this chapter;

(14) “Serious physical injury” means physical injury to an endangered person or an impaired person that:

(A) Creates a substantial risk of death; or

(B) Causes:

(i) Protracted disfigurement;

(ii) Protracted impairment of health; or

(iii) Loss or protracted impairment of the function of any bodily member or organ; and

(15) “Sexual abuse” means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined in § 5-14-101, with another person who is incapable of consent because he or she is:

(A) Mentally defective, as defined in § 5-14-101;

(B) Mentally incapacitated, as defined in § 5-14-101; or

(C) Physically helpless, as defined in § 5-14-101.

History. Acts 1983, No. 452, § 1; A.S.A. 1947, § 59-1301; Acts 1988 (4th Ex. Sess.), No. 5, § 1; 1988 (4th Ex. Sess.), No. 15, § 1; 1993, No. 1292, § 1; 1995, No. 1338, § 2; 1997, No. 1034, § 1; 1999, No. 753, § 1; 2001, No. 1028, § 1; 2003, No. 1046, § 1; 2003, No. 1118, § 1; 2005, No. 255, § 1; 2005, No. 1810, § 1.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1993, No. 1292. Subdivision (4) of this section was also amended by Acts 1993, No. 401, to read as follows:

“‘Exploitation’ means any unjust or improper use of another person or his resources for one’s own profit or advantage.”

This section is set out above as amended by Acts 2005, No. 1810, § 1. Subdivision (10) of this section was also amended by Acts 2005, No. 255, § 1, to change former (10)(A)-(D) to (10)(B)(i)-(iv) and to amend the introductory language in (10) to read as follows:

“(10) ‘Neglect’ means:

“(A) An act or omission by an endangered or impaired adult, including self-neglect; or

“(B) An intentional act or omission by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting.”

Amendments. The 2001 amendment substituted “Director of the Department of Human Services” for “director of the department” in (3)(B); substituted “the person” for “such person” in (4)(B); inserted “herself” in (5); substituted “Department of Human Services” for “department” in (6)(B); rewrote (7)(A) and (8); inserted “a” preceding “physical” in (9)(A);

added “or” to the end of (10)(C)(ii)(b); and made minor punctuation changes throughout.

The 2003 amendment by No. 1046 inserted present (1)(C) and (2) and redesignated the remaining subdivisions accordingly; added (6)(B); inserted “of age” in present (8)(A); added (10)(D); and made minor stylistic changes.

The 2003 amendment by No. 1118 substituted “certified pursuant to Title XIX of the Social Security Act” for “which is required to be licensed under § 20-10-224” in (4)(B); inserted the definition of “Long-term care facility” and redesignated the remaining subdivisions accordingly; and inserted “endangered or” in present (11)(C)(ii).

The 2005 amendment by No. 1810 substituted “purposeful” for “intentional” in (1)(A), (1)(B) and (11)(B); substituted “person” for “adult, including sexual abuse” in (1)(A); in (1)(B), substituted “that a reasonable person would believe” for “which” and “person ... disability” for “adult”; inserted present (1)(c); deleted former (4); redesignated former (1)(c) and (5)-(9) as present (1)(D) and (4)-(8); substituted “purposefully” for “willfully” in present (1)(D); substituted “persons” for “adults” in present (5), (7)(A), (7)(B) and (14); substituted “of a long-term care facility” for “eighteen (18) years of age or older of a long-term care facility, certified pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.” in (4)(B); inserted “or authorized” in (5)(A); deleted present (6)(B); deleted “adult” following “this chapter” in (7)(B); inserted present (8)(E), (8)(F), (9) and (10); inserted the subdivision designations in

present (11) and made related changes; redesignated former (11)(A) as present (12); deleted former (11)(B), (12) and (16);

and deleted “who is not the actor’s spouse and” following “another person” in present (15).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Abused Adults, 26 UALR L.J. 357.

CASE NOTES

Abuse.

The administrative law judge did not make the requisite findings of abusive conduct under § 5-28-101(1), when the judge failed to specify which of the two definitions of abuse in the provision she was applying. Ark. Dep’t of Human Servs. v. Haen, 81 Ark. App. 171, 100 S.W.3d 740 (2003).

Cited: Honor v. Yamuchi, 307 Ark. 324, 820 S.W.2d 267 (1991); Advocat, Inc. v. Sauer, 353 Ark. 29, 111 S.W.3d 346 (2003); Northport Health Servs. v. Owens, 356 Ark. 630, 158 S.W.3d 164 (2004); Dutton v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 835 (Nov. 16, 2005).

5-28-102. Legislative intent.

The General Assembly recognizes that the state must provide for the detection, correction, and prosecution of the maltreatment of adults.

History. Acts 1983, No. 452, § 2; A.S.A. 1947, § 59-1302; Acts 1995, No. 1338, § 2; 2003, No. 1046, § 2.

Amendments. The 2003 amendment rewrote this section.

CASE NOTES

In General.

Arkansas Department of Human Services’ attempt to change the basis of the agency decision, to place an employee on the certified nursing abuse registry, by arguing that the legislative intent found in Ark. Code Ann. § 5-28-102 would nec-

essarily bring the employee’s act into the definition of abuse, was overruled when the specific section cited by the agency as found to be true was not supported by the findings that were made. Ark. Dep’t of Human Servs. v. Haen, 81 Ark. App. 171, 100 S.W.3d 740 (2003).

5-28-103. Criminal penalties for abuse of an endangered or impaired person.

(a) It is unlawful for any person or caregiver to abuse, neglect, or exploit any endangered person or impaired person subject to protection under a provision of this chapter.

(b)(1) If the abuse causes serious physical injury or a substantial risk of death, any person or caregiver who purposely abuses an endangered person or an impaired person is guilty of a Class B felony.

(2) If the abuse causes physical injury, any person or caregiver who purposely abuses an adult endangered person or an adult impaired person in violation of a provision of this chapter is guilty of a Class D felony.

(c)(1) Any person or caregiver who neglects an adult endangered person or an adult impaired person in violation of a provision of this chapter, causing serious physical injury or substantial risk of death, is guilty of a Class D felony.

(2) Any person or caregiver who neglects an adult endangered person or an adult impaired person in violation of a provision of this chapter, causing physical injury, is guilty of a Class B misdemeanor.

(d) Any person or caregiver who abuses an adult endangered person or and adult impaired person is guilty of a Class B misdemeanor.

(e) Any person or caregiver who exploits a person in violation of a provision of this chapter when the value of the property, asset, or resource is:

(1) Two thousand five hundred dollars (\$2,500) or more, is guilty of a Class B felony;

(2) Less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200), is guilty of a Class C felony; and

(3) Two hundred dollars (\$200) or less, is guilty of a Class A misdemeanor.

History. Acts 1983, No. 452, § 3; A.S.A. 1947, § 59-1303; Acts 1993, No. 1292, § 2; 1995, No. 1338, § 2; 2005, No. 1810, § 2; 2005, No. 1994, § 297.

A.C.R.C. Notes. This section is set out above as amended by Acts 2005, No. 1994, § 297. This section was also amended by Acts 2005, No. 1810, § 2, to read as follows: "Criminal penalties for adult abuse.

"(a) It shall be unlawful for any person or caregiver to abuse, neglect, or exploit any endangered or impaired person.

"(b)(1) Any person or caregiver who purposely abuses an endangered or impaired person, if the abuse causes serious physical injury or substantial risk of death, shall be guilty of a Class B felony.

"(2) Any person or caregiver who purposely abuses an endangered or impaired person, if the abuse causes physical injury, shall be guilty of a Class D felony.

"(c)(1) Any person or caregiver who neglects an endangered or impaired person, causing serious physical injury or substantial risk of death, shall be guilty of a Class D felony.

"(2) Any person or caregiver who neglects an endangered or impaired person, causing physical injury, shall be guilty of a Class B misdemeanor.

"(d) Any person or caregiver who abuses an endangered or impaired person shall be guilty of a Class B misdemeanor.

"(e)(1) Any person or caregiver who ex-

ploits a person in violation of the provisions of this chapter shall be guilty of a Class B felony and shall be punished as provided by law, where the value of the property, assets, or resources is two thousand five hundred dollars (\$2,500) or more.

"(2) Any person or caregiver who exploits an endangered or impaired person, where the value of the property, assets, or resources is less than two thousand five hundred dollars (\$2,500), but more than five hundred dollars (\$500) shall be guilty of a Class B felony.

"(3) Any person or caregiver who exploits an endangered or impaired person, where the value of the property, assets, or resources is five hundred dollars (\$500) or less shall be guilty of a Class A misdemeanor."

Amendments. The 2005 amendment by No. 1994 deleted "and shall be punished as provided by law" at the end of (b)(1), (b)(2), (c)(1), (c)(2), and (d); in (e)(1), deleted "shall be guilty of a Class E felony and shall be punished as provided by law" following "chapter" and added "shall be guilty of a Class B felony" at the end; in (e)(2), deleted "shall be guilty of a Class C felony and shall be punished as provided by law" following "chapter" and added "shall be guilty of a Class B felony" at the end; and, in (e)(3), deleted "shall be guilty of a Class A misdemeanor and shall be punished as provided by law" following

“chapter” and added “shall be guilty of a Class A misdemeanor” at the end.

Cross References. Nonsupport, § 5-26-401.

CASE NOTES

ANALYSIS

Neglect shown.

Neglect not shown.

Evidence.

Neglect Shown.

Caretakers’ convictions for violating this section were affirmed where there was evidence of (1) victim’s profound weight loss, debilitation, and inability to walk when rescued, (2) the unsanitary, unhealthy, and inhumane conditions of confinement, (3) and expert testimony that confinement was dangerous and inappropriate for Alzheimer’s patients. *Dutton v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 835 (Nov. 16, 2005).

Neglect Not Shown.

Caregiver held free of any negligence or neglect of adult who died of a morphine

overdose. *Pickens v. Black*, 318 Ark. 474, 885 S.W.2d 872 (1994).

Evidence.

The condition the 77-year-old victim was found to be in at the time of his hospitalization along with the description of his various injuries and the cause of his death did not prove defendant’s guilt; however, there was sufficient evidence from which the jury could have found that the victim was an endangered or impaired adult, or both, that he suffered from a physical or mental defect, or both, and that as a consequence was unable to protect himself from the repeated abuse that he was subjected to or to remove himself from defendant’s care and control. *Thomas v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 712 (Oct. 5, 2005).

Cited: *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Houston v. State*, 82 Ark. App. 556, 120 S.W.3d 115 (2003).

5-28-104. Privilege not grounds for exclusion of evidence.

Any privilege between a husband and a wife or between any professional person, including, but not limited to, a physician, member of the clergy, counselor, hospital, clinic, rest home, or nursing home, and his or her or its client, except between a lawyer and a client, does not constitute a ground for excluding evidence at any proceeding regarding adult maltreatment of an endangered person or an impaired person, or the cause of the adult maltreatment.

History. Acts 1983, No. 452, § 12; A.S.A. 1947, § 59-1312; Acts 1995, No. 1338, § 2; 2005, No. 1810, § 3.

A.C.R.C. Notes. This section was formerly codified as § 5-28-105.

Publisher’s Notes. Former § 5-28-104, concerning notice of prosecution, was repealed by implication by Acts 1995, No.

1338. The former section was derived from Acts 1983, No. 452, § 3; A.S.A. 1947, § 59-1303.

Amendments. The 2005 amendment substituted the first instance of “maltreatment” for “abuse, sexual abuse, or neglect,” “person” for “adult” and “of the adult maltreatment” for “thereof.”

5-28-105. Spiritual treatment alone not abusive.

Nothing in this chapter shall be construed to imply that a reported adult endangered person or adult impaired person, who is being furnished with treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the recognized

church or religious denomination, is for that reason alone a person who is:

- (1) Endangered;
- (2) Abused;
- (3) Neglected;
- (4) Maltreated; or
- (5) Exploited.

History. Acts 1983, No. 452, § 4; A.S.A. 1947, § 59-1304; Acts 1995, No. 1338, § 2.

A.C.R.C. Notes. This section was for-

merly codified as § 5-28-106. Former § 5-28-105 has been renumbered as § 5-28-104.

5-28-106. [Repealed.]

A.C.R.C. Notes. Former § 5-28-106 which was repealed and concerned civil penalties was formerly codified as § 5-28-107. Former § 5-28-106 concerning spiritual treatment has been renumbered as § 5-28-105.

Publisher's Notes. This section, concerning civil penalties, was repealed by Acts 2005, No. 1810, § 4. The section was derived from Acts 1993, No. 1292, § 3; 1995, No. 1338, § 2; 2001, No. 1621, §§ 1, 2; 2003, No. 1162, § 1.

5-28-107. Investigation by Attorney General and Department of Health and Human Services.

(a) The office of the Attorney General has concurrent jurisdiction with the Department of Health and Human Services to investigate cases of suspected adult maltreatment of an adult endangered person or an adult impaired person in a long-term care facility certified under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.

(b) If requested by the office of the Attorney General, a law enforcement agency shall assist in the investigation of any case of suspected adult maltreatment.

(c) The purposes of an investigation are to obtain and develop information that may be necessary to:

- (1) Protect an abused, neglected, or exploited adult;
- (2) Refer for criminal prosecution a person who abuses, neglects, or exploits any adult endangered person or adult impaired person; and
- (3) Initiate a civil action, when appropriate, to protect an abused, neglected, or exploited adult.

(d) The Attorney General shall conduct a thorough investigation which may include a medical, psychological, social, vocational, financial, and educational evaluation and review.

(e)(1) Upon request, the medical, mental health, or other record regarding the abused, neglected, or exploited adult maintained by any facility or maintained by any person required by this chapter to report suspected abuse, neglect, or exploitation shall be made available to the Attorney General for the purpose of conducting an investigation under this chapter.

(2) Upon request, a financial record maintained by a bank or a similar institution shall be made available to the Attorney General for the purpose of conducting an investigation under this chapter.

(f)(1) A subpoena requiring the production of a document or the attendance of a witness at an interview, trial, or hearing conducted pursuant to the jurisdiction of the Medicaid Fraud Control Unit of the office of the Attorney General may be served by the Attorney General or any duly authorized law enforcement officer in the State of Arkansas personally, telephonically, or by registered or certified mail.

(2) In the case of service by registered or certified mail, the return post office receipt of delivery of the subpoena shall accompany the return.

(g)(1) If a facility or person upon whom a subpoena is served objects or otherwise fails to comply with the Attorney General's request for records, the Attorney General may file an action in circuit court for an order to enforce the request.

(2) Venue for the action to enforce the request is in Pulaski County.

(h) Upon cause shown, the circuit court shall order the facility or person who maintains the medical, mental health, or other record regarding the abused, neglected, or exploited adult to tender the requested record to the Attorney General for the purpose of conducting an investigation under this chapter.

(i)(1) A record obtained by the Attorney General pursuant to this chapter shall be classified as confidential information and is not subject to outside review or release by any individual except when a record is used or is potentially to be used by any governmental entity in any legal, administrative, or judicial proceeding.

(2) Notwithstanding any other law to the contrary, no person is subject to any civil or criminal liability for providing a record or providing access to a record to the Attorney General or to a prosecuting attorney.

History. Acts 1993, No. 1292, § 3; 1995, No. 1338, § 2; 2003, No. 1046, § 1; 2003, No. 1164, § 1; 2005, No. 1810, § 5.

A.C.R.C. Notes. This section was formerly codified as § 5-28-108. Former § 5-28-107 has been renumbered as § 5-28-106.

Amendments. The 2003 amendment by No. 1046 deleted former (a); redesignated former (b) as present (a); in present (a), inserted "with the Department of Hu-

man Services," substituted "adult maltreatment" for "abuse, neglect, or exploitation" and added "42 U.S.C. 1396 et seq."; added present (b); deleted former (c); and made related stylistic changes.

The 2003 amendment by No. 1164 rewrote this section.

The 2005 amendment, in (a), inserted "with the Department of Human Services" and substituted "under" for "pursuant to."

5-28-108. Special deputy prosecutor.

(a) An attorney employed in the office of the Attorney General may be designated by a prosecuting attorney having criminal jurisdiction in a matter as a special deputy prosecutor for the purpose of prosecuting in a court of competent jurisdiction an action brought under this

chapter or another action for the physical or mental abuse or exploitation of a long-term care facility resident.

(b)(1) As a special deputy prosecutor, an attorney designated under subsection (a) of this section may issue a subpoena and administer an oath as provided in § 25-16-705.

(2) The subpoena shall be substantially in the form set forth in § 25-16-705(b).

(c) A special deputy prosecutor appointed and functioning as authorized under this section is entitled to the same immunity granted by law to the prosecuting attorney.

(d)(1) Appointment as a special deputy prosecutor does not enable an attorney designated under subsection (a) of this section to receive any additional fee or salary from the state for a service provided pursuant to the appointment.

(2) Any expense of the special deputy prosecutor and any fees and costs incurred by the special deputy prosecutor in the prosecution of a case as provided in this section is the responsibility of the Attorney General.

(e) The prosecuting attorney may revoke the appointment of a special deputy prosecutor at any time.

History. Acts 1995, No. 894, § 1.

A.C.R.C. Notes. Former § 5-28-108 has been renumbered as § 5-28-107.

5-28-109. [Repealed.]

Publisher's Notes. This section, concerning investigative powers of the Attorney General, was repealed by Acts 2005, No. 1810, § 6. The section was derived from Acts 2003, No. 1046, § 4.

This section was also repealed by Acts 2005, No. 1994, § 513.

5-28-110. Penalties for violation of § 12-12-1601 et seq.

(a) Any person or caregiver required by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1601 et seq., to report a case of suspected adult maltreatment or long-term care facility resident maltreatment who purposely fails to do so is:

(1) Guilty of a Class B misdemeanor; and

(2) Civilly liable for damages proximately caused by the failure.

(b) Any person, official, or institution willfully making a false notification by the Adult and Long-Term Care Facility Resident Maltreatment Act, § 12-12-1601 et seq., knowing the allegation to be false, is guilty of a:

(1) Class A misdemeanor; or

(2) Class D felony if the person, official, or institution has been previously convicted of making a false allegation.

(c) Any person who willfully permits and any other person who encourages the release of data or information contained in the adult

and long-term care facility maltreatment central registry to a person to whom disclosure is not permitted under this section, § 5-28-201 [repealed], or §§ 5-28-203 — 5-28-221 [repealed] is guilty of a Class A misdemeanor.

(d) Any person required to report a death as the result of suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report immediately to the appropriate coroner is guilty of a Class C misdemeanor.

(e) Any person required to report suspected adult maltreatment or long-term care facility resident maltreatment who knowingly fails to make a report within twenty-four (24) hours or on the next business day, whichever is earlier, is guilty of a Class C misdemeanor.

History. Acts 1983, No. 452, § 13; A.S.A. 1947, § 59-1313; Acts 1993, No. 1292, § 5; 1995, No. 1338, § 2; 2003, No. 1046, § 13; 2005, No. 1810, § 8; 2005, No. 1994, § 298.

Publisher's Notes. This section was formerly codified as § 5-28-202.

Amendments. The 2003 amendment substituted "adult maltreatment" for "abuse, neglect, or exploitation" in present (a); and added present (b) and (c).

The 2005 amendment by No. 1810 substituted "by the Adult and Long-Term

Care Facility Resident Maltreatment Act" for "by this chapter" in present (a) and for "under this subchapter" in present (b); deleted "and shall be punished as provided by law" at the end of present (a)(1); inserted "or long-term care facility resident" in present (a); inserted "and long-term care facility" in present (c); and added present (d) and (e).

The 2005 amendment by No. 1994 deleted "and shall be punished as provided by law" at the end of present (a)(1).

SUBCHAPTER 2 — REPORTING

SECTION.

5-28-201. [Repealed.]

5-28-202. [Transferred.]

5-28-203 — 5-28-205. [Repealed.]

5-28-206 — 5-28-209. [Repealed.]

SECTION.

5-28-210. [Repealed.]

5-28-211, 5-28-212. [Repealed.]

5-28-213 — 5-28-221. [Repealed.]

Effective Dates. Acts 1988 (4th Ex. Sess.), No. 5, § 6, and No. 15, § 6: July 15, 1988. Emergency clause provided: "It is hereby found and determined by the General Assembly that during recent months, certain inadequacies in the continuum of health care for the older citizens of this State have been brought to the attention of the General Assembly; that this Act is necessary to assure each citizen of this State in need of long-term care that a high quality of care at affordable cost will be provided; that the older citizenry of this State deserve the best possible care; that the immediate passage of this Act is essential to the health, welfare and safety of the citizens of the State of Arkansas and to avoid irreparable harm upon the proper administration of an essential govern-

ment program. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 542, § 11: Mar. 14, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that a recent court decision has led to uncertainty in the area of immunity under existing Arkansas Code provisions; that to clarify such provisions will allow those persons to avoid needless legal expenses resulting from the possible misinterpretation of the law. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the

public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1292, § 11: Apr. 22, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the prosecuting attorneys are in need of specific legislation by which to protect endan-

gered adults in the State of Arkansas and that immediate passage of this act is necessary for that purpose. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Access to Public Records Under the Arkansas Freedom of Information Act, 37 Ark. L. Rev. 741.

5-28-201. [Repealed.]

Publisher’s Notes. This section, concerning the adult maltreatment central registry, was repealed by Acts 2005, No. 1810, § 7. The section was derived from

Acts 1983, No. 452, § 14; A.S.A. 1947, § 59-1314; Acts 1993, No. 1292, § 4; 1995, No. 1338, § 2; 2003, No. 1046, § 5.

5-28-202. [Transferred.]

Publisher’s Notes. Former § 5-28-202 has been renumbered as § 5-28-110.

5-28-203 — 5-28-205. [Repealed.]

Publisher’s Notes. These sections, concerning reporting adult maltreatment, were repealed by Acts 2005, No. 1812, § 2. The sections were derived from the following sources:

5-28-203. Acts 1983, No. 452, § 5; A.S.A. 1947, § 59-1305; Acts 1988 (4th Ex. Sess.), No. 5, § 2; 1988 (4th Ex. Sess.), No. 15, § 2; 1993, No. 1292, § 6; 1995, No. 1296, § 4; 1995, No. 1338, § 2; 1999, No. 753, § 2; 2001, No. 1028, § 2; 2003, No. 1046, § 6.

5-28-204. Acts 1983, No. 452, § 6; A.S.A. 1947, § 59-1306; Acts 1995, No.

1338, § 2; 1999, No. 499, § 1; 1999, No. 753, § 3; 2001, No. 499, § 1; 2003, No. 1046, § 7.

5-28-205. Acts 1983, No. 452, § 7; A.S.A. 1947, § 59-1307; Acts 1995, No. 1338, § 2.

Former § 5-28-203 was also amended by Acts 2005, No. 255, § 2 and Acts 2005, No. 912, § 2, which were subsequently subject to this repeal.

Former § 5-28-204 was also amended by Acts 2005, No. 255, § 3, which was subsequently subject to this repeal.

5-28-206 — 5-28-209. [Repealed.]

Publisher’s Notes. These sections, concerning reporting procedures generally, contents of central registry, telephone reporting, determination of prior records, and the contents of the report, were repealed by Acts 2003, No. 1046, § 8. The

sections were derived from the following sources:

5-28-206. Acts 1983, No. 452, § 9; A.S.A. 1947, § 59-1309; Acts 1995, No. 1338, § 2; 1999, No. 753, § 4; 2001, No. 1028, § 3.

5-28-207. Acts 1983, No. 452, § 14; A.S.A. 1947, § 59-1314; Acts 1995, No. 1338, § 2; 1999, No. 753, § 5.

5-28-208. Acts 1983, No. 452, § 14; A.S.A. 1947, § 59-1314; Acts 1995, No. 1338, § 2; 1999, No. 753, § 6.

5-28-209. Acts 1983, No. 452, § 9; A.S.A. 1947, § 59-1309; Acts 1995, No. 1338, § 2; 1999, No. 753, § 7.

5-28-210. [Repealed.]

Publisher's Notes. This section, concerning investigation by the Department of Human Services, was repealed by Acts 2005, No. 1812, § 10. The section was derived from Acts 1983, No. 452, § 10; A.S.A. 1947, § 59-1310; Acts 1988 (4th

Ex. Sess.), No. 5, § 3; 1988 (4th Ex. Sess.), No. 15, § 3; 1993, No. 401, § 2; 1993, No. 1292, § 7; 1995, No. 1338, § 2; 1997, No. 1033, § 1; 1997, No. 1034, § 2; 1999, No. 753, § 8; 2001, No. 1028, § 4; 2003, No. 1046, § 9.

5-28-211, 5-28-212. [Repealed.]

Publisher's Notes. These sections, concerning rights of subject of report, notice of finding, and amend and appeal, and expungement of information, were repealed by Acts 2003, No. 1046, § 10 [3]. The sections were derived from the following sources:

5-28-211. Acts 1983, No. 452, § 14;

A.S.A. 1947, § 59-1314; Acts 1995, No. 1338, § 2; 1999, No. 753, § 9; 2001, No. 1028, § 5.

5-28-212. Acts 1983, No. 452, § 14; A.S.A. 1947, § 59-1314; Acts 1995, No. 616, § 1; 1995, No. 1338, § 2; 1999, No. 753, § 14.

5-28-213 — 5-28-221. [Repealed.]

Publisher's Notes. These sections, concerning reporting of adult maltreatment, were repealed by Acts 2005, No. 1812, § 11[4]. The sections were derived from the following sources:

5-28-213. Acts 1983, No. 452, § 14; A.S.A. 1947, § 59-1314; Acts 1995, No. 1338, § 2; 1997, No. 1034, § 3; 1999, No. 753, § 10; 2001, No. 1028, § 6; 2003, No. 1046, § 11.

5-28-214. Acts 1983, No. 452, § 9;

A.S.A. 1947, § 59-1309; Acts 1995, No. 1338, § 2; 1999, No. 753, § 11.

5-28-215. Acts 1983, No. 452, § 11; A.S.A. 1947, § 59-1311; Acts 1991, No. 542, § 1; 1995, No. 1338, § 2.

5-28-216. Acts 1999, No. 753, § 12.

5-28-217. Acts 2003, No. 1046, § 12.

5-28-218. Acts 2003, No. 1046, § 12.

5-28-219. Acts 2003, No. 1046, § 12.

5-28-220. Acts 2003, No. 1046, § 12.

5-28-221. Acts 2003, No. 1046, § 12.

SUBCHAPTER 3 — PROTECTIVE PLACEMENT AND CUSTODY

SECTION.

5-28-301 — 5-28-310. [Repealed.]

5-28-301 — 5-28-310. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 2005, No. 1811, § 2. The subchapter was derived from the following sources:

5-28-301. Acts 1983, No. 452, § 8; A.S.A. 1947, § 59-1308; Acts 1993, No. 401, § 3; 1995, No. 1338, § 2; 1997, No.

1034, § 4; 1999, No. 753, § 13; 2001, No. 1028, § 7; 2003, No. 1034, § 1.

5-28-302. Acts 1983, No. 452, § 8; A.S.A. 1947, § 59-1308; Acts 1995, No. 1338, § 2; 1999, No. 753, § 13.

5-28-303. Acts 1983, No. 452, § 8; A.S.A. 1947, § 59-1308; Acts 1995, No.

1338, § 2; 1999, No. 753, § 13; 2001, No. 1028, § 8; 2003, No. 1034, § 2.

5-28-304. Acts 1983, No. 452, § 8; A.S.A. 1947, § 59-1308; Acts 1995, No. 1338, § 2; 1997, No. 1034, § 5; 1999, No. 753, § 13; 2001, No. 1028, § 9; 2003, No. 1034, § 3.

5-28-305. Acts 1995, No. 1338, § 2; 1999, No. 753, § 13.

5-28-306. Acts 1983, No. 452, § 8; A.S.A. 1947, § 59-1308; Acts 1995, No. 1338, § 2; 1997, No. 1034, § 6; 1999, No. 753, § 13; 2001, No. 1028, § 10; 2003, No. 1034, § 4.

5-28-307. Acts 1999, No. 753, § 13; 2003, No. 1034, § 5.

5-28-308. Acts 1999, No. 753, § 13; 2003, No. 1034, § 6.

5-28-309. Acts 2003, No. 1034, § 7.

5-28-310. Acts 2003, No. 1034, § 7.

Former § 5-28-306 was also amended by Acts 2005, No. 2191, § 1, which was subsequently subject to this repeal.

CHAPTERS 29-34

[Reserved]

SUBTITLE 4. OFFENSES AGAINST PROPERTY

CHAPTER 35

GENERAL PROVISIONS

[Reserved]

CHAPTER 36

THEFT

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. THEFT OF PUBLIC BENEFITS.
3. WIRELESS SERVICES THEFT PREVENTION LAW.
4. OFFENSES INVOLVING THEFT DETECTION DEVICES.

A.C.R.C. Notes. References to “this chapter” in subchapter 1 may not apply to subchapters 2-4 which were enacted subsequently.

Cross References. Burglary, § 5-39-201.

Credit card, fraudulent use to obtain property or services, § 5-37-207.

Disposition of stolen property, § 16-80-103.

Fines, § 5-4-201.

Robbery, § 5-12-101 et seq.

Term of imprisonment, § 5-4-401.

Venue of prosecutions, § 16-88-113.

RESEARCH REFERENCES

ALR. Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 ALR 4th 481.

Retailer’s failure to pay to government sales or use tax funds as constituting larceny or embezzlement. 8 ALR 4th 1068.

“Constructive” possession of stolen property establishing requisite element of possession supporting offense of receiving stolen property. 30 ALR 4th 488.

Am. Jur. 50 Am. Jur. 2d, Larceny, § 1 et seq.

Ark. L. Rev. 1976 Criminal Code-General Principles, 30 Ark. L. Rev. 111.

Official Misconduct Under the Arkansas Criminal Code, 30 Ark. L. Rev. 160.

C.J.S. 52B C.J.S., Larceny, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

Note — Evidence — Incidents of Shoplifting Not Probative of Truthfulness Under Rule 608(b), 6 UALR L.J. 321.

Survey, Criminal Law, 13 UALR L.J. 341.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-36-101. Definitions.

5-36-102. Consolidation of offenses — Shoplifting presumption — Amount of theft.

5-36-103. Theft of property.

5-36-104. Theft of services.

5-36-105. Theft of property lost, mislaid, or delivered by mistake.

5-36-106. Theft by receiving.

5-36-107. Theft of a trade secret.

5-36-108. Unauthorized use of a vehicle.

5-36-109 — 5-36-114. [Reserved.]

SECTION.

5-36-115. Theft of leased, rented, or entrusted personal property — False report of wealth or credit.

5-36-116. Shoplifting.

5-36-117. [Repealed.]

5-36-118. [Repealed.]

5-36-119. [Repealed.]

5-36-120. Theft of motor fuel.

5-36-121. Theft of recyclable materials.

5-36-122. Motion picture piracy.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1893, No. 159, § 9: effective on passage.

Acts 1893, No. 178, § 7: effective on passage.

Acts 1893, No. 188, § 8: Apr. 1, 1893.

Acts 1957, No. 50, § 7: approved Feb. 15, 1957. Emergency clause provided: "Whereas, this Act being necessary to the public peace, health and safety of the people of the State of Arkansas, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage."

Acts 1979, No. 592, § 3: Mar. 27, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the present law relating to the theft of property, proof that the value of the property taken exceeds one hundred dollars (\$100.00) is necessary for the offense to constitute a felony; that in the case of the theft of livestock, it is often difficult to prove value; that this Act is designed to improve the administration of justice by making the theft of any livestock up to the value of \$2500.00 a class D felony and should be given effect as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being

necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 883, § 3: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion exists regarding the penalties for theft of leased personal property; that such confusion should not exist regarding the criminal laws of this State; that this Act will clarify the confusion and therefore should be given immediate effect. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 303, § 5: Feb. 28, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that in 1995 the General Assembly increased from \$200 to \$500 the felony theft of property threshold but inadvertently left the felony theft by receiving threshold at \$200; that this act increases the felony theft by receiving threshold from \$200 to \$500 and thereby makes it compatible with the theft of property statute; that the \$200 felony theft by receiving threshold is unreasonably low and should

be increased as soon as possible to avoid unintended felony convictions. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 518, § 6: Mar. 13, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the monetary threshold for a Class C felony theft of services and a Class B misdemeanor theft of property, lost, mislaid, or delivered by mistake is over twenty (20) years old and needs to be increased to reflect today's circumstances; that this act increases that threshold to a more reasonable amount; that until this act is passed the possible punishment for the crimes is unreasonable; and that this act should therefore be given effect as soon as possible. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health

and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 745, § 3: Mar. 13, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the present law relating to theft of property does not adequately punish persons who steal motor fuel from retail service stations. Furthermore, with the price of motor fuel rising and the increase in these instances, this is an issue ripe for legislation. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

5-36-101. Definitions.

As used in this chapter:

(1) "Article" means any object, material, device, or substance or copy of an object, material, device, or substance, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map;

(2) "Copy" means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article;

(3)(A) "Deception" means:

(i) Creating or reinforcing a false impression, including a false impression of fact, law, value, or intention or other state of mind that the actor does not believe to be true;

(ii) Preventing another person from acquiring information that would affect his or her judgment of a transaction;

(iii) Failing to correct a false impression that the actor knows to be false and that he or she created or reinforced or that he or she knows

to be influencing another person to whom the actor stands in a fiduciary or confidential relationship;

(iv) Failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property that the actor transfers or encumbers in consideration for the property or service obtained, or in order to continue to deprive another person of that other person's property, whether the impediment is or is not valid or is or is not a matter of official record; or

(v) Employing any other scheme to defraud;

(B) As to a person's intention to perform a promise, "deception" shall not be inferred solely from the fact that the person did not subsequently perform the promise.

(C) "Deception" does not include:

(i) Falsity as to a matter having no pecuniary significance; or

(ii) Puffing by a statement unlikely to deceive an ordinary person in the group addressed;

(4) "Deprive" means to:

(A) Withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner;

(B) Withhold property or to cause it to be withheld with the purpose to restore it only upon the payment of a reward or other compensation; or

(C) Dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely;

(5) "Motor fuel" means:

(A) Gasoline, diesel fuel, or alcohol;

(B) Any mixture of gasoline, diesel fuel, or alcohol; or

(C) Any other fuel sold for use in an automobile or related vehicle;

(6) "Obtain" means:

(A) In relation to property, to bring about a transfer or purported transfer of property or of an interest in the property, whether to the actor or another person; or

(B) In relation to a service, to secure performance of the service;

(7) "Property" means severed real property or tangible or intangible personal property, including money or any paper or document that represents or embodies anything of value;

(8)(A) "Property of another person" means any property in which any person or government other than the actor has a possessory or proprietary interest.

(B) However, "property of another person" does not include property in the possession of the actor in which another person has only a security interest, even though legal title is in the secured party pursuant to a conditional sales contract or other security agreement;

(9) "Service" includes:

(A) Labor;

(B) Professional service;

(C) Transportation;
(D) Telephone, mail, or other public service;
(E) Gas, electricity, or other public utility service;
(F) Accommodation in a hotel, restaurant, or other public accommodation;

(G) Admission to an exhibition; and

(H) Use of a vehicle or other property;

(10)(A) "Threat" means a menace, however communicated, to:

(i) Cause physical injury to any person or to commit any other criminal offense;

(ii) Cause damage to any property;

(iii) Accuse any person of a crime;

(iv) Expose a secret or publish a fact tending to subject any person, living or deceased, to hatred, contempt, shame, or ridicule;

(v) Impair any person's credit or business repute;

(vi) Take or withhold action as a public servant or cause a public servant to take or withhold action;

(vii) Testify or provide information or withhold testimony or information with respect to a legal claim or defense of another person;

(viii) Bring about or continue a strike, boycott, or other collective action if a property or service is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(ix) Do any other act which would not in itself substantially benefit the actor or a group he or she purports to represent but which is calculated to harm another person in a substantial manner with respect to his or her health, safety, business, employment, calling, career, financial condition, reputation, or a personal relationship.

(B) "Threat" does not include an expression of intent to accuse, expose, bring suit, or otherwise invoke official action under subdivisions (10)(A)(iii)-(vi) of this section if made to obtain property claimed as restitution or indemnification for harm done in the circumstances to which accusation, exposure, lawsuit, or other official action relates or as compensation for property or a lawful service;

(11) "Trade secret" means the whole or any portion of any valuable scientific or technical information, design, process, procedure, formula, or improvement that is not accessible to a person other than a person selected by the owner to have access for a limited purpose;

(12)(A) "Value" means:

(i) The market value of a property or service at the time and place of the offense, or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense;

(ii) In the case of a written instrument, other than a written instrument having a readily ascertainable market value, the amount due and collectible at maturity less any part that has been satisfied if the written instrument constitutes evidence of a debt, or the greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the written instrument if the written instrument is other than evidence of a debt; or

(iii) Any inherent, subjective, or idiosyncratic worth the owner or possessor of property attaches to the property even if the property has no market value or replacement cost.

(B)(i) If the actor gave consideration for or had a legal interest in the property or service, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service to determine value.

(ii) However, in a case of theft by receiving under § 5-36-106, the consideration the actor gave for the property shall not be deducted to determine value; and

(13) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 2201; A.S.A. 1947, § 41-2201; Acts 1987, No. 934, § 2; 1997, No. 829, § 1; 2001, No. 745, § 1.

Amendments. The 2001 amendment added (5); and realphabetized the remaining subdivisions.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 10 UALR L.J. 559.

CASE NOTES

ANALYSIS

Deception.
Deprivation.
Instructions.
Property of another person.
Value.

Deception.

The crucial element of intent to deceive may be proven in many ways, such as by showing the nature of the false impressions or misrepresentations, by showing that the deceived party lacked the present or future ability to make good his representations, or by demonstrating an ongoing scheme or pattern of deception. *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981).

For attempted theft by deception, the only issues are the defendant's state of mind and his belief as to what the facts are, not whether an item taken has actual value or whether the defendant actually deceived the victim. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

Deprivation.

Evidence held to establish clearly that defendant made use of the funds received for purposes other than for what was

promised, consequently, those persons who had paid money to the defendant for the delivery of certain goods were deprived of the use and benefit of their property. *Hixson v. State*, 266 Ark. 778, 587 S.W.2d 70 (1979), cert. denied, 444 U.S. 1079, 100 S. Ct. 1030, 62 L. Ed. 2d 762 (1980).

Jurisdiction in Arkansas was proper for defendant's theft trial because sufficient circumstantial evidence existed to show that defendant took unauthorized control of a vehicle in West Memphis. *King v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 231 (Apr. 14, 2005).

Instructions.

Where the evidence adduced established that the municipal clerk's office was deprived of property valued at \$4,675.20 and there was no evidence tending to disprove one of the elements of Class B felony theft of property, the trial court properly refused to instruct the jury on misdemeanor theft of property. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Property of Another Person.

"Property of another person" includes property in which a person has a propri-

etary interest; thus money victim held for church in her capacity as church treasurer was "property of another", and could be aggregated with victim's own money to determine grade of offense. *Phillips v. State*, 297 Ark. 368, 761 S.W.2d 933 (1988).

Evidence was sufficient to convict defendants of breaking or entering and theft of property where (1) a prosecution witness testified that she saw defendants break into an apartment and take a table; (2) a police officer observed that the security door had been pried open and the wooden door was kicked in; and (3) a defense witness testified that they took the table for their own use, that none of them owned it, and that there was an owner, but no one knew where the owner was. *Bush v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 302 (Apr. 6, 2005).

Value.

Evidence of value held sufficient to support conviction. *Boone v. State*, 264 Ark. 169, 568 S.W.2d 229 (1978) (decision under prior law).

Testimony regarding the value of the stolen property held not sufficient to prove that a lawnmower was worth more than \$100. *Riley v. State*, 267 Ark. 916, 593 S.W.2d 45 (Ct. App. 1979).

An owner's testimony as to stolen property's original cost does not meet the test for proving value since it is the owner's present interest in the property that the law seeks to protect. *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981).

Evidence held insufficient to establish value under this section and not sufficient to support a conviction for theft of property. *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981).

Where a gold and silver dealer testified that the stolen gold rings which defendant attempted to sell him were worth far more than \$100, his testimony was properly admitted as a positive statement of value by one qualified as an expert. *Jones v. State*, 6 Ark. App. 7, 636 S.W.2d 880 (1982).

Court properly allowed the owner of gold rings to testify as to the price he paid for them prior to the theft, since the purchase price was not too remote and it bore a reasonable relation to the present value of the gold rings. *Jones v. State*, 6 Ark. App. 7, 636 S.W.2d 880 (1982).

Although checks do not have a readily ascertainable market value, they can be valued for purposes of the theft of property statute under subdivision (11)(A)(iii) of this section. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

The term "actor", as used under subdivision (12)(B), is intended to include all persons who have committed any form of theft set out in this chapter, including theft by receiving. *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989).

Under subdivision (12)(B) an accused or defendant is entitled to deduct the amount of consideration he or she paid for the misappropriated property. *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989).

"Value" is the market value of the property at the time and place of the offense, or, if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. *Chase v. State*, 46 Ark. App. 261, 879 S.W.2d 455 (1994).

Although witness did not testify specifically to the retail price of the merchandise at the time of the offense, she did testify to the value of the merchandise based on the wholesale cost, which was sufficient to establish the value of the property and therefore sufficient to support the defendant's theft conviction. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

Evidence was sufficient to convict defendant of criminal attempt to commit theft of property where the victim testified as to the purchase price of the boat motor, his use and maintenance of it, and its condition at the time of the crime. *Wright v. State*, 80 Ark. App. 114, 91 S.W.3d 553 (2002).

One witness's testimony regarding minor improvements to a 1978 vehicle, coupled with 11 photographs, did not constitute substantial evidence of a value greater than \$ 500. *Reed v. State*, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 217 (May 1, 2003).

There was insufficient evidence to have convicted defendant of theft of property with a value greater than \$500 but less than \$2,500 where the only witness, a mechanic, stated car was not worth \$50, there was no evidence of what the victim had paid for the car, and the State produced only photographs of the car at trial;

however, there was there was sufficient evidence to support a conviction of misdemeanor theft, which carried a term of one year's imprisonment. *Reed v. State*, 353 Ark. 22, 109 S.W.3d 665 (2003).

Cited: *Stanley v. Mabry*, 596 F.2d 332 (8th Cir. 1979), cert. denied, 444 U.S. 946, 100 S. Ct. 307, 62 L. Ed. 2d 315 (1979); *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979); *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979); *Wiley v. State*, 268 Ark. 552, 594 S.W.2d 57 (Ct. App. 1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *State v. Jamison*, 277 Ark. 349, 641 S.W.2d 719 (1982); *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584

(1987); *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988); *Muhammed v. State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989); *Coley v. State*, 302 Ark. 526, 790 S.W.2d 899 (1990); *Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990); *Jackson v. State*, 37 Ark. App. 160, 826 S.W.2d 307 (1992); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *Cox-Hilstrom v. State*, 58 Ark. App. 109, 948 S.W.2d 409 (1997); *Greer v. State*, 77 Ark. App. 180, 72 S.W.3d 893 (2002); *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003); *McEntire v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 599 (Oct. 13, 2005).

5-36-102. Consolidation of offenses — Shoplifting presumption — Amount of theft.

(a) Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses known before January 1, 1976, as:

- (1) Larceny;
- (2) Embezzlement;
- (3) False pretense;
- (4) Extortion;
- (5) Blackmail;
- (6) Fraudulent conversion;
- (7) Receiving stolen property; and
- (8) Other similar offenses.

(b) Notwithstanding the specification of a different manner in the indictment or information, a criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(c) The knowing concealment, upon an actor's person or the person of another, of an unpurchased good or merchandise offered for sale by any store or other business establishment, gives rise to a presumption that the actor took the good or merchandise with the purpose of depriving the owner or another person having an interest in the good or merchandise.

(d)(1) The amount involved in a theft is deemed to be the highest value, by any reasonable standard, of the property or service that the actor obtained or attempted to obtain.

(2) An amount involved in a theft committed pursuant to one (1) scheme or course of conduct, whether from one (1) or more persons, may be aggregated in determining the grade of the offense.

History. Acts 1975, No. 280, § 2202; A.S.A. 1947, § 41-2202.

CASE NOTES

ANALYSIS

Construction.
Purpose.
Conversion.
Evidence.
Indictment, information or charge.
Instructions.
Presumption.
Separate offenses.
Value.

Construction.

This section does not authorize a court to alter the elements of one type of theft offense, which has not been amended, by applying to it a statute that amends a different theft offense. *Coleman v. State*, 327 Ark. 381, 938 S.W.2d 845 (1997).

Purpose.

All stolen property crimes were consolidated into the crime of theft by the Criminal Code, the intention being to eliminate needless wrangling over the question whether particular conduct that is obviously criminal constitutes one offense rather than another. *State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978), cert. denied, 441 U.S. 964, 99 S. Ct. 2412, 60 L. Ed. 2d 1069 (1979).

Conversion.

Conversion is any distinct act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner's right. The conversion need not be a manual taking or for the defendant's use; if the defendant exercises control over the goods in exclusion, or defiance, of the plaintiff's right, it is a conversion whether it is for his own use or another's use. *Forehand v. First Bank*, 315 Ark. 282, 867 S.W.2d 431 (1993).

Evidence.

Meaningful distinction cannot be drawn, for purposes of Evid. Rule 608(b), relating to specific instances of conduct, between embezzlement and other forms of theft. *Sitz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Where it was undisputed that a theft occurred, and defendant's receipt of the goods with knowledge or good reason to believe they had been stolen could be established by his confession, the state did

not have to independently prove each specific element of the offense of theft by receiving to establish the corpus delicti. *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990).

Indictment, Information or Charge.

Amending the charge to theft by deception changed neither the nature nor the degree of the crime charged, since both prior to and after the amendment, the defendant was charged with the theft of property having a value of \$2,500 or more, a Class B felony; the only variation between the initial charge and the charge as amended was the alleged manner of the commission of the theft. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979).

Provisions of this section allow a charge of theft to be proved notwithstanding specification of a different manner in the information or indictment. *Martin v. State*, 272 Ark. 376, 614 S.W.2d 512 (1981).

Instructions.

Where the challenged instruction merely set out the law applicable to the issue of false arrest, and where the instruction did not advise the jury that any presumption had been established by the evidence adduced at trial, but to the contrary, advised the jury that if they found the facts to meet the requisites for the statutory presumption, then their verdict should be for defendant, the instruction given was not erroneous. *Dawson v. Pay Less Shoes #904 Co.*, 269 Ark. 23, 598 S.W.2d 83 (1980).

Presumption.

The statutory presumption of subsection (b) is not essential to a conviction on a charge of shoplifting, if the evidence is otherwise sufficient, i.e., if intent to deprive the owner of the property involved is shown by evidence from which that intent may be inferred. *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979).

The statutory presumption of subsection (b) would justify the submission of the question of intent only if a reasonable juror on the evidence as a whole, including the evidence of basic facts, could find the requisite intent beyond a reasonable doubt. *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979).

Where the evidence showed that unpurchased goods were in sight at all times, the plaintiff did not have to overcome the presumption contained in subsection (b) that larcenous intent can be presumed where unpurchased goods are concealed on the person. *Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1984).

Evidence held sufficient to give rise to the necessary presumption under this section. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

The presumption created by this section does not establish probable cause as a matter of law in a malicious prosecution proceeding. *Wal-Mart Stores, Inc. v. Williams*, 71 Ark. App. 211, 29 S.W.3d 754 (2000).

Separate Offenses.

The legislature did not intend to create a statute that would merge an instance of theft-by-receiving, under § 5-36-106, that is committed in one jurisdiction with an instance of theft-of-property, under § 5-36-103, committed in a second jurisdiction; clearly, the two crimes are separate and distinct, and an interpretation of this section that the two offenses merge is particularly untenable when applied to factual circumstances wherein the theft crimes are not committed in the same

criminal episode. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002).

Value.

Stolen property in which victim has either a proprietary or possessory interest may be aggregated to determine grade of offense. *Phillips v. State*, 297 Ark. 368, 761 S.W.2d 933 (1988).

Cited: *Bailey v. State*, 266 Ark. 260, 583 S.W.2d 62 (1979); *White v. State*, 271 Ark. App. 692, 610 S.W.2d 266 (1981); *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981); *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982); *Roberts v. State*, 281 Ark. 218, 663 S.W.2d 178 (1984); *Culhane v. State*, 282 Ark. 286, 668 S.W.2d 24 (1984); *Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984); *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985); *Mendenhall v. Skaggs Cos.*, 285 Ark. 236, 685 S.W.2d 805 (1985); *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985); *National Bank of Commerce v. Hoffman*, 70 Bankr. 155 (Bankr. W.D. Ark. 1986); *Tippitt v. Lockhart*, 859 F.2d 595 (8th Cir. 1988); *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989); *Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989); *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997); *Miller v. Kroger Co.*, 82 Ark. App. 281, 105 S.W.3d 789 (2003).

5-36-103. Theft of property.

(a) A person commits theft of property if he or she knowingly:

(1) Takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner of the property; or

(2) Obtains the property of another person, by deception or by threat, with the purpose of depriving the owner of the property.

(b) Theft of property is a:

(1) Class B felony if:

(A) The value of the property is two thousand five hundred dollars (\$2,500) or more;

(B) The property is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The property is obtained by threat, and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The property is:

(i) Anhydrous ammonia in any form; or

(ii) A product containing any percentage of anhydrous ammonia in any form;

(2) Class C felony if:

(A) The value of the property is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500);

(B) The property is obtained by threat;

(C) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500);

(D) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number; or

(E) The property is livestock and the value of the livestock is in excess of two hundred dollars (\$200);

(3)(A) Class D felony if:

(i) The value of the property is five hundred dollars (\$500) or less; and

(ii) The property was unlawfully obtained during a criminal episode.

(B) As used in subdivision (b)(3)(A)(ii) of this section, "criminal episode" means a series of thefts committed by the same person on three (3) or more occasions within three (3) days; or

(4) Class A misdemeanor if:

(A) The value of the property is five hundred dollars (\$500) or less; or

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost.

(c)(1) Upon the proclamation of a state of emergency by the President of the United States or the Governor or upon the declaration of a local emergency by the executive officer of any city or county and for a period of thirty (30) days following that declaration, the penalty for theft of property is enhanced if the property is:

(A) A generator intended for use by:

(i) A public facility;

(ii) A nursing home or hospital;

(iii) An airport;

(iv) A public safety device;

(v) A communication tower or facility;

(vi) A public utility;

(vii) A water system or sewer system;

(viii) A public safety agency; or

(ix) Any other facility or use providing a vital service; or

(B) Any other equipment used in the transmission of electric power or telephone service.

(2) As used in this subsection (c):

(A) "Public safety agency" means an agency of the State of Arkansas or a functional division of a political subdivision that provides:

(i) Fire fighting and rescue;

(ii) Natural or man-caused disaster or major emergency response;

(iii) Law enforcement; and

- (iv) Ambulance or emergency medical services; and
- (B) "Public safety device" includes, but is not limited to, a traffic signaling device or a railroad crossing device.
- (3) The penalty is enhanced as follows:
 - (A)(i) The fine for the offense shall be at least five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).
 - (ii) The fine is mandatory; and
 - (B) The offense is a Class D felony if it would have been a Class A misdemeanor.

History. Acts 1975, No. 280, § 2203; 1977, No. 360, § 8; 1979, No. 592, § 1; 1983, No. 719, § 1; A.S.A. 1947, § 41-2203; Acts 1987, No. 934, § 3; 1991, No. 712, § 1; 1995, No. 277, § 1; 1997, No. 516, § 1; 2001, No. 157, § 1; 2001, No. 1195, § 1; 2003, No. 838, § 1; 2005, No. 1442, § 1.

Amendments. The 2001 amendment by No. 157 added (c).

The 2001 amendment by No. 1195 inserted present (b)(3).

The 2003 amendment added (b)(2)(D)(ii).

The 2005 amendment added (b)(1)(D) and made related changes.

Cross References. Forfeiture of property, § 5-5-301 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Survey of Arkansas Law, Evidence, 1 UALR L.J. 191.

Survey of Arkansas Law, Evidence, 5 UALR L.J. 139.

Survey — Criminal Law, 10 UALR L.J. 559.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Theft of Debit Card, 26 UALR L.J. 363.

CASE NOTES

Note. Many of the cases cited below were decided prior to the consolidation of offenses by § 5-36-102.

ANALYSIS

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Constitutionality.

This section is not unconstitutionally vague since the general class of offenses (theft by deception or false pretenses) is within the terms of the statute which promotes a long standing state interest in prohibiting deceptive schemes and confidence games. *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981).

In General.

Asportation and caption are not requisites of wrongful appropriation. *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978).

Construction.

The term "exercises unauthorized control" in subdivision (a)(1) is directed at the bailee who lawfully takes control of the property, but subsequently appropriates it to his own use, but the term must be read in conjunction with the clause "purpose of depriving the owner thereof," since a deviation from the terms of bailment is theft only if done with the requisite purpose to deprive the bailor. *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979).

Applicability.

The amendment of subdivision (b)(2)(A) of this section, which changed the dollar amount from \$200 to \$500, and which occurred after defendant committed his offense but before trial, did not apply to defendant; the governing statute was the one in effect at the time defendant committed the crime. *Cody v. State*, 326 Ark. 85, 929 S.W.2d 159 (1996).

Where the debtor was aware of the bank's security interest at the time he undertook to sell the bank's collateral, debtor's actions constituted both the tort of conversion and the state law statutory offenses of theft and defrauding secured creditors, and therefore he acted with malice in harming the bank's property when he misappropriated the sale proceeds in which he had no legal or equitable interest. *Mercantile Bank of Ark., N.A. v. Speers*, 244 Bankr. 142 (Bankr. E.D. Ark. 2000).

Accomplices.

For cases discussing accessories or accomplices, see *Lester v. State*, 32 Ark. 727 (1878); *Friend v. State*, 109 Ark. 498, 160 S.W. 384 (1913); *Monk v. State*, 130 Ark. 358, 197 S.W. 580 (1917); *Davidson v. State*, 132 Ark. 116, 200 S.W. 137 (1917); *Webb v. State*, 206 Ark. 640, 176 S.W.2d 915 (1944); *Mortensen v. State*, 214 Ark. 528, 217 S.W.2d 325 (1949) (preceding decisions under prior law) *Franklin v. State*, 311 Ark. 601, 845 S.W.2d 525 (1993).

Appropriations.

Ark. Const., Art. 5, § 30 provides that appropriation acts can do nothing but appropriate funds for one specific subject; but that does not mean that someone cannot be charged with theft by deception for improperly taking money from an account created by an appropriation. *Clark v. State*, 308 Ark. 453, 824 S.W.2d 345 (1992).

Prosecuting a constitutional officer for theft by deception for violating an appropriation act does not violate due process of law because there is no criminal penalty in an appropriation act. *Clark v. State*, 308 Ark. 453, 824 S.W.2d 345 (1992).

Assistance of Counsel.

Defendant's constitutional right to counsel held violated when court refused request for continuance to obtain counsel. *Murdock v. State*, 291 Ark. 8, 722 S.W.2d 268 (1987).

Attempted Theft.

For attempted theft by deception, the only issues are the defendant's state of mind and his belief as to what the facts are, not whether an item taken has actual value or whether the defendant actually deceived the victim. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

Burden of Proof.

The burden was on the prosecution to prove the falsity of the representations in a prosecution for the offense of obtaining property by false pretense. *Anderson v. State*, 226 Ark. 498, 290 S.W.2d 846 (1956) (decision under prior law).

Charge.

Factual question not resolved whether probable cause to charge defendant with false swearing or theft by deception. First

Com. Bank v. Kremer, 292 Ark. 82, 728 S.W.2d 172 (1987).

Conversion by Bailee.

Former section concerning conversion of property embraced all bailees, and was not confined to bailees of the generic class. Wallis v. State, 54 Ark. 611, 16 S.W. 821 (1891) (preceding decisions under prior law); Compton v. State, 102 Ark. 213, 143 S.W. 897 (1912) (preceding decisions under prior law).

Defendant held not to violate former section concerning conversion of property by a bailee where he obtained check from government due him under contract and failed to pay subcontractors and laborers out of this check but departed thenceforth even though he had promised to pay subcontractors and laborers when he received the check. Lewis v. State, 220 Ark. 259, 247 S.W.2d 195 (1952) (decision under prior law).

Use of employer's truck by employee to go to and from work constituted a bailment; and use by employee of employer's truck on a personal errand instead of going home as he was authorized to do constituted larceny so as to enable employer to recover under theft policy for loss of truck in collision with tree while driven by employee. Sullivan v. Pennsylvania Fire Ins. Co., 223 Ark. 721, 268 S.W.2d 372 (1954) (decision under prior law).

The crux of former section concerning conversion of property by a bailee was not intent to convert the property to the use of the bailee but to use the property contrary to the agreement. Thrifty Rent-A-Car v. Jeffrey, 257 Ark. 904, 520 S.W.2d 304 (1975) (decision under prior law).

Deception.

—In General.

Evidence held sufficient to show fraudulent scheme. Webb v. State, 206 Ark. 640, 176 S.W.2d 915 (1944) (decision under prior law).

Deliberate and consistent giving of checks with insufficient funds to pay them held to amount to knowingly making misrepresentations of material facts and was characterized as fraud instead of mismanagement. Hi-Pro Fish Prods., Inc. v. McClure, 346 F.2d 497 (8th Cir. 1965); Cox-Hilstrom v. State, 58 Ark. App. 109, 948 S.W.2d 409 (1997).

—Evidence.

Misrepresentations relating solely to the future did not constitute an offense. Kerby v. State, 233 Ark. 8, 342 S.W.2d 412 (1961) (decision under prior law).

Evidence held sufficient to establish a misrepresentation of fact. Dean v. State, 258 Ark. 32, 522 S.W.2d 421 (1975) (decision under prior law).

Evidence held insufficient to support conviction for theft by deception. Wiley v. State, 268 Ark. 552, 594 S.W.2d 57 (Ct. App. 1980).

Evidence held sufficient to support finding that defendant obtained the property by deception. Parker v. State, 270 Ark. 3, 603 S.W.2d 393 (1980).

Evidence held sufficient to sustain conviction of theft by deception. Hixson v. Housewright, 642 F.2d 242 (8th Cir. 1981); Wilson v. State, 277 Ark. 43, 639 S.W.2d 45 (1982); Wilson v. State, 56 Ark. App. 47, 939 S.W.2d 313 (1997).

—False Pretenses.

False pretense could not relate to something to happen in the future. Conner v. State, 137 Ark. 123, 206 S.W. 747 (1918) (decision under prior law).

Evidence held sufficient to support conviction of obtaining money or property by false pretenses or representations. Long v. State, 160 Ark. 607, 255 S.W. 300 (1923); Norris v. State, 170 Ark. 484, 280 S.W. 398 (1926); Hadley v. State, 196 Ark. 307, 117 S.W.2d 352 (1938); Mortensen v. State, 214 Ark. 528, 217 S.W.2d 325 (1949); Kerby v. State, 233 Ark. 8, 342 S.W.2d 412 (1961) (preceding decisions under prior law).

The offense of obtaining property by false pretenses was complete when a thing of value had been obtained knowingly and designedly from another by false pretenses with an intent to defraud such person of such property and it was unnecessary to charge or prove an actual pecuniary loss or damage. Fisher v. State, 161 Ark. 586, 256 S.W. 858 (1923) (decision under prior law).

Evidence held insufficient to support conviction for obtaining medical services by false pretenses. McLain v. State, 181 Ark. 730, 27 S.W.2d 518 (1930) (decision under prior law).

Actions held to constitute obtaining money under false pretense. Lamb v. State, 202 Ark. 931, 155 S.W.2d 49 (1941) (decision under prior law).

One of the essential elements of the offense of obtaining property by false pretenses was that the representation had to be false. *Anderson v. State*, 226 Ark. 498, 290 S.W.2d 846 (1956) (decision under prior law).

The false pretense which constituted an offense was a false representation of an existing fact or past event by one who knew that it was not true and of such nature as to induce the party to whom made to part with something of value. *Karr v. State*, 227 Ark. 777, 301 S.W.2d 442 (1957) (decision under prior law).

Defendants who falsely represented themselves to be qualified termite exterminators and who collected more than the approximate worth of the work done, were properly convicted of the crime of obtaining property by false pretenses. *Daley v. State*, 236 Ark. 89, 364 S.W.2d 678 (1963) (decision under prior law).

Where the only false representation proved was that the victim would, in the future, have an exclusive distributorship for a certain area, no submissible issue was presented to the jury as to false representation of a past or existing fact. *Bakri v. State*, 261 Ark. 765, 551 S.W.2d 215 (1977) (decision under prior law).

—Identification.

Although codefendant gave varying statements about defendant's participation and the victim was unable to identify the defendant, the identification evidence held sufficient in view of the scientific evidence and the testimony of the codefendant. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

—Sufficiency.

Evidence of theft held sufficient where defendant admitted that he took twenty-five dollars from the victim's purse, a witness identified the gun found in defendant's sister's apartment as belonging to the victim, and another witness saw the victim's gun in the defendant's pocket on the day of the offense. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Victim's eyewitness identification testimony and the officers' identification testimony based on the surveillance tape and a still photograph was sufficient to sustain convictions of aggravated robbery and theft of property; moreover, the victim's testimony that she was fearful and be-

lieved defendant was armed, based on his pointing his jacket at her and insinuating that he had a gun, supported the weapon requirement under § 5-12-103. *Edwards v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 57 (Jan. 27, 2005).

Due Process.

District court's grant of writ of habeas corpus was on the ground that the trial court's refusal to allow defendant to inform the jury of his prior acquittal on possession charges rendered his trial fundamentally unfair. *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), cert. denied, 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993).

Particular actions held to be embezzlement. *Palmer v. State*, 109 Ark. 411, 160 S.W. 204 (1913); *Miller v. State*, 155 Ark. 13, 243 S.W. 958 (1922) (preceding decisions under prior law).

Evidence need sufficient to sustain a conviction of embezzlement. *Bratton v. State*, 213 Ark. 537, 211 S.W.2d 428 (1948); *Edens v. State*, 235 Ark. 996, 363 S.W.2d 923 (1963); *Pharr v. State*, 246 Ark. 424, 438 S.W.2d 461 (1969) (preceding decisions under prior law).

Embezzlement.

Particular actions held not to be embezzlement. *Johnson v. State*, 102 Ark. 139, 143 S.W. 593 (1912) (decision under prior law).

Evidence.

—In General.

A conviction for theft can be sustained upon evidence that property is missing, that the defendant had the opportunity to take it, and no one else had that opportunity. *Green v. State*, 269 Ark. 953, 601 S.W.2d 273 (Ct. App. 1980).

Admission of seized drugs in prosecution of burglary and theft was not barred by collateral estoppel because defendant's prior acquittal did not determine an ultimate fact in defendant's prosecution. *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), cert. denied, 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993).

—Admissibility.

When the accused had opportunity to steal several pieces of jewelry, evidence was admissible that she had possession of some of the jewelry to show that she stole a particular ring which was one of the

pieces taken. *Lynch v. State*, 95 Ark. 168, 128 S.W. 1053 (1910) (decision under prior law).

Evidence as to misrepresentations relating solely to the future were admissible where relevant in assisting the jury in understanding all the circumstances surrounding the transaction. *Davis v. State*, 241 Ark. 646, 411 S.W.2d 531 (1967) (decision under prior law).

Testimony held admissible to show defendant's fraudulent scheme. *Dean v. State*, 258 Ark. 32, 522 S.W.2d 421 (1975) (decision under prior law).

Where the microfilm copies of bank records were adequately identified by the bank's officer as being copies of records kept in the normal course of business, they were competent evidence in a prosecution on two felony counts of theft of property and on one misdemeanor count of drawing and uttering an insufficient fund check with intent to defraud. *Reed v. State*, 267 Ark. 1017, 593 S.W.2d 472 (Ct. App. 1980).

Items which were seized pursuant to a search warrant and then identified by victim as those things which were in his automobile when it was stolen were relevant and admissible in prosecution for robbery and theft where there was testimony connecting defendant with items and vehicles. *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980).

Price tags of stolen clothes are hearsay and are not admissible. *Williams v. State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989).

The evidence of defendant's prior shoplifting conviction was relevant and admissible under Evid. Rule 404(b) to show a unique method of operation as well as the defendant's intent, preparation, plan, and absence of mistake or accident in committing the theft. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

Although the evidence was sufficient to convict defendant of financial identity fraud and theft of property, because the search of defendant's purse, which contained the evidence necessary for those convictions, by the first victim came at the sheriff's request, the first victim was an agent of the police and the warrantless search of defendant's purse violated the Fourth Amendment. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004).

—Sufficiency.

Evidence held sufficient to support con-

viction. *Jefferson v. State*, 89 Ark. 129, 115 S.W. 1140 (1909); *Duty v. State*, 212 Ark. 890, 208 S.W.2d 162 (1948); *Lindsey v. State*, 229 Ark. 450, 316 S.W.2d 349 (1958); *French v. State*, 231 Ark. 677, 331 S.W.2d 863 (1960); *Williams v. State*, 251 Ark. 878, 475 S.W.2d 530 (1972); *Cox v. State*, 254 Ark. 1, 491 S.W.2d 802, cert. denied, 414 U.S. 923, 94 S. Ct. 230, 38 L. Ed. 2d 157 (1973); *Higginbotham v. State*, 260 Ark. 433, 541 S.W.2d 303 (1976) (preceding decisions under prior law); *Hill v. State*, 261 Ark. 711, 551 S.W.2d 200 (1977); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977); *Lunon v. State*, 264 Ark. 188, 569 S.W.2d 663 (1978); *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978); *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979); *Jeffers v. State*, 268 Ark. 329, 595 S.W.2d 687 (1980); *Reed v. State*, 267 Ark. 1017, 593 S.W.2d 472 (Ct. App. 1980); *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980); *Boykin v. State*, 270 Ark. 284, 603 S.W.2d 911 (1980); *Williams v. State*, 270 Ark. 513, 606 S.W.2d 75 (1980); *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980); *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982); *Beard v. State*, 277 Ark. 35, 639 S.W.2d 52 (1982); *Elkins v. State*, 7 Ark. App. 166, 646 S.W.2d 15 (1983); *O'Riordan v. State*, 281 Ark. 424, 665 S.W.2d 255 (1984); *Davis v. State*, 284 Ark. 557, 683 S.W.2d 926 (1985); *Williams v. State*, 295 Ark. 18, 746 S.W.2d 44 (1988); *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989); *Muhammed v. State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989), cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989); *Williams v. State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989); *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990); *Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990); *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992); *Franklin v. State*, 311 Ark. 601, 845 S.W.2d 525 (1993); *Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988); *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994); *C.H. v. State*, 51 Ark. App. 153, 912 S.W.2d 942 (1995); *Turner v. State*, 64 Ark. App. 216, 984 S.W.2d 52 (1998); *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000).

Trial judge could infer that defendant was exercising unauthorized control over the property with the intention of taking it out of the store. *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979); *Wilson v.*

State, 301 Ark. 342, 783 S.W.2d 852 (1990).

Evidence held sufficient to establish that defendant made use of the funds received for purposes other than for what was promised, consequently, the victims were deprived of the use and benefit of their property. *Hixson v. State*, 266 Ark. 778, 587 S.W.2d 70 (1979), cert. denied, 444 U.S. 1079, 100 S. Ct. 1030, 62 L. Ed. 2d 762 (1980).

Evidence held insufficient to support conviction for theft by taking unauthorized control over the property of another person. *Wiley v. State*, 268 Ark. 552, 594 S.W.2d 57 (Ct. App. 1980).

Evidence held insufficient to support conviction. *Green v. State*, 269 Ark. 953, 601 S.W.2d 273 (Ct. App. 1980); *Rolax v. State*, 270 Ark. 197, 603 S.W.2d 903 (Ct. App. 1980); *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981); *Pridgett v. State*, 276 Ark. 52, 631 S.W.2d 833 (1982).

Evidence held sufficient to find that the defendant knowingly exercised unauthorized control over another person's property. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Sufficient evidence to support a charge of theft may exist even though the object stolen cannot be produced at trial. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

Fingerprints can constitute evidence which is sufficient to sustain a conviction. *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985).

Evidence held sufficient to support conviction. *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988); *Doby v. State*, 28 Ark. App. 23, 770 S.W.2d 666 (1989).

Insufficient evidence of burglary and theft of property was presented to corroborate the testimony of an admitted accomplice. *Gibson v. State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993); *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994).

The testimony of witnesses, and the fact that defendant's truck was identified as the truck carrying the same brand and size of the tires that were stolen, was sufficient to support the convictions for burglary and theft of property. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

Victim's pretrial and in-court identifications of the defendant were unequivocal and clearly constituted sufficient evidence

for the jury to conclude without having to speculate that defendant was the perpetrator. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994).

A single fingerprint of the defendant's on a mirror found in the stolen car, along with the proximity of the car to defendant's residence and the fact that defendant's relatives lived near the lot where the car was stolen, constituted sufficient evidence of guilt. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997), supplemental op., reh'g denied, 328 Ark. App. 116 (1997).

Where several employees noticed defendant entering a rented hotel room without authorization, defendant confessed to stealing two guns, and police were able to recover one of the guns in the location offered by defendant in a confession, there was substantial evidence presented to support a theft conviction. *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003).

Witness who testified that she was a manager-level employee, that she handled the store when the manager was absent, and that as such she was familiar with the store's merchandise pricing, had independent actual knowledge of the value of stolen articles. *Polk v. State*, 82 Ark. App. 210, 105 S.W.3d 797 (2003).

In an armed robbery and theft prosecution, testimony of the driver of the getaway car that directly linked defendant to the robbery, the corroborating testimony of a store employee that defendant took money from, and that of an officer that defendant fled from after the getaway car crashed, was sufficient to convict defendant under § 16-89-111. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004).

Circumstances surrounding defendant's actions demonstrated his intent or purpose to deprive the owners of their property where defendant, working as a salesman, specifically defied the owner's instruction to return the truck and unsold cases of meat and then defendant deliberately chose to leave the truck in a motel parking lot without any word to the owners as to the whereabouts of the property; further, when defendant failed to return the truck, along with the cases of meat that defendant had not yet paid for, his use and control over the property was unauthorized. *Watson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 419 (June 24, 2004).

Defendant's conviction was not rendered infirm merely because fingerprint evidence was the only evidence presented against defendant; the fact-finder did not resort to speculation and conjecture in reaching its verdict as defendant's fingerprints were not found on an easily moveable object, but rather, were located at the apparent location of entry to the car, the location of the crime, on the interior of the car's window. *Phillips v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 662 (Sept. 29, 2004).

Evidence was sufficient to convict defendants of breaking or entering and theft of property where (1) a prosecution witness testified that she saw defendants break into an apartment and take a table; (2) a police officer observed that the security door had been pried open and the wooden door was kicked in; and (3) a defense witness testified that they took the table for their own use, that none of them owned it, and that there was an owner, but no one knew where the owner was. *Bush v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 302 (Apr. 6, 2005).

Evidence was sufficient to sustain a conviction for theft of property and to corroborate the accomplice's testimony where witnesses testified as to the role defendant played in the robbery and described his clothing and weapon, which were collected at the scene; further, defendant's jacket had blood stains on it and a hole corresponding to the location of a gunshot wound he received, and defendant was found hiding inside a dumpster near the site where his car became stuck in the mud. *Flowers v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 510 (June 22, 2005).

Jurisdiction in Arkansas was proper for defendant's theft trial because sufficient circumstantial evidence existed to show that defendant took unauthorized control of a vehicle in West Memphis. *King v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 231 (Apr. 14, 2005).

There was sufficient evidence to support defendant's conviction of theft by deception where defendant stole tens of thousands of dollars from his mother's elderly neighbor; defendant added the victim to his savings account, deposited tens of thousands of dollars of her savings bonds and checks into it, withdrew money from

this account and transferred it into his other accounts, and used the funds for his own personal expenditures. *McEntire v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 599 (Oct. 13, 2005).

Indictment or Information.

—In General.

No allegation of value was necessary in an indictment for stealing of animals. *Sanders v. State*, 55 Ark. 365, 18 S.W. 376 (1892); *Thompson v. State*, 60 Ark. 59, 28 S.W. 794 (1894); *Houston v. State*, 66 Ark. 607, 53 S.W. 44 (1899); *Leach v. State*, 67 Ark. 314, 55 S.W. 15 (1900) (preceding decisions under prior law).

For cases discussing the sufficiency of the wording of an indictment or information, see *State v. Boyce*, 65 Ark. 82, 44 S.W. 1043 (1898); *Marshall v. State*, 71 Ark. 415, 75 S.W. 584 (1903); *Bennett v. State*, 73 Ark. 386, 84 S.W. 483 (1904); *Cook v. State*, 80 Ark. 495, 97 S.W. 683 (1906); *Storms v. State*, 81 Ark. 25, 98 S.W. 678 (1906); *State v. Scoggin*, 85 Ark. 43, 106 S.W. 969 (1907); *State v. Perry*, 94 Ark. 215, 126 S.W. 717 (1910); *Osborne v. State*, 96 Ark. 400, 132 S.W. 210 (1910); *Wells v. State*, 102 Ark. 627, 145 S.W. 531 (1912); *McCool v. State*, 149 Ark. 653, 233 S.W. 769 (1921); *State v. Bond*, 151 Ark. 203, 235 S.W. 801 (1921); *Holden v. State*, 156 Ark. 521, 247 S.W. 768 (1923); *Gurley v. State*, 164 Ark. 397, 262 S.W. 636 (1924); *Smallen v. State*, 168 Ark. 1128, 272 S.W. 858 (1925); *Gurley v. State*, 179 Ark. 1149, 20 S.W.2d 886 (1929); *Criglow v. State*, 183 Ark. 407, 36 S.W.2d 400 (1931); *Reid v. State*, 194 Ark. 422, 108 S.W.2d 464 (1937); *Matz v. State*, 196 Ark. 97, 116 S.W.2d 604 (1938); *Baker v. State*, 200 Ark. 688, 140 S.W.2d 1008 (1940); *Davis v. State*, 241 Ark. 646, 411 S.W.2d 531 (1966); *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978) (preceding decisions under prior law).

The indictment had to allege ownership of money embezzled. *Silvie v. State*, 117 Ark. 108, 173 S.W. 857 (1915) (preceding decisions under prior law).

Value of property held inferentially alleged. *Underwood v. State*, 205 Ark. 864, 171 S.W.2d 304 (1943) (decision under prior law).

Ownership of the property taken could be alleged in the information or subsequent bill of particulars either in the real

owner or in the person in whose possession the property was at the time taken. *Powell v. State*, 251 Ark. 46, 471 S.W.2d 333 (1971), cert. denied, 406 U.S. 917, 92 S. Ct. 1763, 32 L. Ed. 2d 115 (1972) (decision under prior law).

Since the value of property went to the essence of the charge in the absence of allegations of value in the information, there was a duty to properly advise the defendant as to whether he was charged with the misdemeanor or a felony before requiring him to plead to the charge. *Scoggins v. State*, 258 Ark. 749, 528 S.W.2d 641 (1975) (decision under prior law).

Allegation of ownership in the indictment by one from whom money was obtained by false pretenses is sufficient and proof that it was actually owned by someone else is not a fatal variance. *Hoover v. State*, 262 Ark. 856, 562 S.W.2d 55 (1978) (decision under prior law).

Amending the charge to theft by deception changed neither the nature nor the degree of the crime charged, since both prior to and after the amendment, the defendant was charged with the theft of property having a value sufficient to charge a Class B felony; the only variation between the initial charge and the charge as amended was the alleged manner of the commission of the theft; however, the amendment was of great enough significance that the conduct of defendant's defense was prejudiced by lack of fair notice. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979).

Where information alleged that defendant took unauthorized control of property of corporation by forging checks on company funds in bank, proof of ownership of property properly supported the allegation of the information so that defendant was not entitled to a directed verdict of acquittal, since the provisions of § 5-36-102 allow a charge of theft to be proved notwithstanding specification of a different manner in the information or indictment. *Martin v. State*, 272 Ark. 376, 614 S.W.2d 512 (1981).

Information held to have given defendant sufficient notice of the charges that he faced. *Drew v. State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983).

—Variance.

The allegation of false personation in an indictment was descriptive of the offense,

and had to be proved as alleged; and proof that two were acting in concert, and one personated the assumed party with the assent of the other, did not sustain the charge of false personation against the latter. *Kirtley v. State*, 38 Ark. 543 (1882) (decision under prior law).

Proof that defendant stole a mare sustained an allegation that he stole a horse. *State v. Gooch*, 60 Ark. 218, 29 S.W. 640 (1895) (decision under prior law).

Where an indictment for grand larceny alleged generally that the accused stole a certain quantity of goods, and alleged specifically the quantities of the stolen goods belonging to various persons, the general allegations as to the quantity was controlled by the special allegations. *Reeder v. State*, 86 Ark. 341, 111 S.W. 272 (1908) (decision under prior law).

It was not a variance from the allegations of an indictment alleging the stealing of property from a partnership to prove the names of the partners other than as alleged nor was the failure to prove the names at all as alleged a fatal variance. *Ivey v. State*, 109 Ark. 446, 160 S.W. 208 (1913) (decision under prior law).

An allegation that defendant stole "one cow (bull)" was sustained by proof that he stole a bull. *State v. Haller*, 119 Ark. 503, 177 S.W. 1138 (1915) (decision under prior law).

Proof of the stealing of paper and silver money supported a conviction under an indictment charging the stealing of gold, silver and paper money. *Cook v. State*, 130 Ark. 90, 196 S.W. 922 (1917) (decision under prior law).

Upon an information for burglary and grand larceny, one could not be convicted for receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

In prosecution for obtaining money by false pretenses neither the failure to name the true owner of the money involved in the information, nor the absence of the owner from the trial was a denial of defendant's constitutional right of confrontation of the witnesses or a variance from the allegations of the information. *Hoover v. State*, 262 Ark. 856, 562 S.W.2d 55 (1978) (decision under prior law).

Although defendant who made false representations to obtain money did not receive the money personally, this fact does not constitute a fatal variance where

the money was obtained solely for defendant's benefit to carry out a contract made by him and on which he personally assumed all obligations. *Hoover v. State*, 262 Ark. 856, 562 S.W.2d 55 (1978) (decision under prior law).

Trial court did not err when it allowed the State to go forward with an accomplice theory even though the information failed to allege such where the information in fact named the offense and the party to be charged, it contained the elements of the offense intended to be charged, and it apprised appellant of what he had to be prepared to meet. *Polk v. State*, 82 Ark. App. 210, 105 S.W.3d 797 (2003).

Instructions.

An instruction which told the jury that if they found from the evidence beyond a reasonable doubt that the defendant did intentionally convert moneys to his own use, then it was an unlawful and felonious conversion of said funds was not objectionable as an expression of opinion upon the facts. *Gurley v. State*, 164 Ark. 397, 262 S.W. 636 (1924) (decision under prior law).

Refusal to instruct that the state failed to establish ownership and defendant should be acquitted held proper. *Threadgill v. State*, 207 Ark. 478, 181 S.W.2d 236 (1944) (decision under prior law).

Refusal to instruct that if defendant had not intended to steal car, but had intended only to steal a part therefrom, he would only have been guilty of a misdemeanor held proper. *Hall v. State*, 242 Ark. 201, 412 S.W.2d 603 (1967) (decision under prior law).

Refusal to instruct the jury on petit larceny held error. *Pierce v. State*, 248 Ark. 204, 451 S.W.2d 219 (1970) (decision under prior law).

Refusal to give a requested instruction that the misrepresentation could not relate to future actions even if it were accompanied by a present intention not to perform held to be error. *Dean v. State*, 258 Ark. 32, 522 S.W.2d 421 (1975) (decision under prior law).

Refusal to submit the issue of petit larceny to the jury held not error and requested instruction on petit larceny held properly refused. *Higginbotham v. State*, 260 Ark. 433, 541 S.W.2d 303 (1976) (decision under prior law).

Court's erroneous statement in instruc-

tion that theft of property was a felony if value of the property was less than \$100 but more than \$10,000 held not prejudicial. *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977).

Where information charged defendant with theft of property, it was reversible error for court to instruct jury that it would consider guilt of defendant for violation of § 5-36-105 dealing with theft of property by mistake. *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980).

The trial court did not err in giving the jury instruction that theft of the property was a Class C felony where the owner of the stolen car testified that her parents paid \$1500.00 for the vehicle, and there was a reasonable relation between the purchase price and the value of the car at the time it was stolen. *Jones v. State*, 290 Ark. 113, 717 S.W.2d 200 (1986).

Where the evidence was not so conclusive as to demonstrate that only the greater offense could have been committed by defendant, the jury was entitled to consider testimony of witness who valued stolen property at less than \$2,500; therefore, it was error to refuse an instruction on the lesser degree of theft. *Turley v. State*, 32 Ark. App. 89, 796 S.W.2d 851 (1990).

Intent.

A felonious intent had to exist at the time of the taking. *Fulton v. State*, 13 Ark. 168 (1852); *Gooch v. State*, 60 Ark. 5, 28 S.W. 510 (1894) (decisions under prior law).

A felonious intent was an essential constituent of larceny, and had to be shown by circumstances connected with the taking. *Mason v. State*, 32 Ark. 238 (1877) (decision under prior law).

When one took another's horse without any intention of converting it to his own use, but to ride for some miles, which he did, and then abandoned it, it was a trespass, but not larceny. *Dove v. State*, 37 Ark. 261 (1881) (decision under prior law).

Where a bailee wrongfully sold property and subsequently took it secretly from the possession of the purchaser, intending in good faith to restore it to its true owner, he was not guilty of larceny for there was not only no intention to deprive the true owner of his property, but an intention to restore it to him. *Gooch v. State*, 60 Ark. 5, 28 S.W. 510 (1894) (decision under prior law).

A conviction would not be sustained where the evidence showed that defendant tried to prevent the property from being taken from the owner's possession. *Henderson v. State*, 79 Ark. 333, 96 S.W. 359 (1906) (decision under prior law).

One taking a pistol from another for the sole purpose of disarming him was not guilty of larceny. *Bailey v. State*, 92 Ark. 216, 122 S.W. 497 (1909) (decision under prior law).

A person who, in good faith, took property believing it to be his was not guilty of larceny, even though after learning it was not his, he converted it to his own use. *Wilson v. State*, 96 Ark. 148, 131 S.W. 336 (1910) (decision under prior law).

Any use by defendant of money of another was a conversion, and the state need not prove a specific intent to deprive the true owner permanently thereof. *Russell v. State*, 112 Ark. 282, 166 S.W. 540 (1914) (decision under prior law).

Intent held to be a jury question. *Lucius v. State*, 116 Ark. 260, 170 S.W. 1016 (1914); *Schultz v. State*, 219 Ark. 217, 242 S.W.2d 131 (1951) (preceding decisions under prior law).

The intent to steal could be inferred by the jury from proof that the defendant killed and sold livestock belonging to another. *Collins v. State*, 184 Ark. 20, 41 S.W.2d 781 (1931) (decision under prior law).

Fraudulent intent to convert property to the own use of the defendant could be inferred from the acts of wrongful conversion. *Smith v. State*, 219 Ark. 829, 245 S.W.2d 226 (1952) (decision under prior law).

The intention and design of the party were best explained by a complete view of every part of his conduct at the time, and not merely from the proof of a single and isolated act or declaration. *Kerby v. State*, 233 Ark. 8, 342 S.W.2d 412 (1961) (decision under prior law).

Guilt under former section defining larceny did not require an intent of the accused to convert the stolen property to his own use. *Barker v. State*, 248 Ark. 649, 453 S.W.2d 413 (1970) (decision under prior law).

Evidence that defendant defrauded bank by "kiting" checks written by another showed that he obtained check with intent to defraud. *Stewart v. State*, 256

Ark. 619, 509 S.W.2d 298 (1974) (decision under prior law).

Evidence held sufficient that the jury's determination that defendant had the essential criminal intent, despite his contention that because of his intoxication he was incapable of forming the specific intent to steal, would not be set aside. *Johnson v. State*, 259 Ark. 773, 536 S.W.2d 704 (1976).

Intent to deprive the owner of his property was an element of the offense of shoplifting. *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979).

Evidence held insufficient to meet the reasonable doubt test on the question of intent. *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979).

The crucial element of intent to deceive may be proven in many ways, such as by showing the nature of the false impressions or misrepresentations, by showing that the deceived party lacked the present or future ability to make good his representations, and by demonstrating an ongoing scheme or pattern of deception. *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981).

Where defendant had been observed placing merchandise in a companion's purse, and, when confronted, defendant threw all the merchandise on a shelf as he attempted to flee, nothing in his conduct indicated that defendant was renouncing an intent to commit theft. *White v. State*, 271 Ark. App. 692, 610 S.W.2d 266 (1981).

Intent necessary to convict held established by substantial circumstantial evidence. *Wrather v. State*, 1 Ark. App. 155, 613 S.W.2d 601 (1981).

Where one takes the property of another without his permission but with the present intention of returning it or of paying the owner for it later, he is not guilty of theft. Of course this rule is restricted to the borrowing of such items as are readily replaceable by a person who has the power to restore or replace them. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Jurisdiction.

There was no substantial evidence to support a finding of jurisdiction for the theft of personal property where no element of the crime was committed in Arkansas. *Graham v. State*, 34 Ark. App. 126, 806 S.W.2d 32 (1991).

Notwithstanding the fact that the affidavit referred to the stealing of an ATM card as opposed to a credit card, where the information charged the defendant with a crime under this section, a Class C felony, jurisdiction was appropriate in circuit court. *Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997).

Knowledge.

This section requires only that one knowingly take unauthorized control over the property of another; it does not require that he know either the value or the true character of the property taken. *Chadwell v. State*, 37 Ark. App. 9, 822 S.W.2d 402 (1992).

Larceny.

For cases discussing whether particular actions constitute larceny, see *Coon v. State*, 109 Ark. 346, 160 S.W. 226 (1913); *Central Sur. Fire Corp. v. Williams*, 213 Ark. 600, 211 S.W.2d 891 (1948); *Massachusetts Fire & Marine Ins. Co. v. Cagle*, 214 Ark. 189, 214 S.W.2d 909 (1948); *Edwards v. State*, 244 Ark. 1145, 429 S.W.2d 92 (1968); *Bridges v. State*, 257 Ark. 527, 519 S.W.2d 756 (1975) (preceding decisions under prior law).

Lesser Included Offenses.

Larceny was included in robbery; under an indictment for the latter a conviction of the former could be had. *Haley v. State*, 49 Ark. 147, 4 S.W. 746 (1887); *Cook v. State*, 130 Ark. 90, 196 S.W. 922 (1917) (preceding decisions under prior law).

The offense of knowingly receiving stolen property was not a lesser offense of either burglary or larceny and therefore an indictment or information charging only the greater offense did not support a conviction of knowingly receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

To prove robbery the state only has to show that there was an intent to commit a theft; consequently, the offense of theft of property is not a lesser included offense in a charge of the crime of burglary. *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979).

The gist of the crime of theft of property delivered by mistake is the failure to take reasonable measure to restore the property to the person entitled thereto, and this is distinct and separate from any

element contained in the crime of theft of property by knowingly taking or exercising unauthorized control over the property of another, with the purpose of depriving the owner thereof; therefore, a violation of § 5-36-105 is not a lesser included offense under this section. *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980).

The offenses of aggravated robbery and theft of property are separate and distinct and not dependent upon the same evidence to support the convictions; accordingly, defendant's conviction on both charges did not subject him to double jeopardy. *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980).

Refusal to give the instruction requested on the lesser included offense held error. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Theft and conspiracy to commit theft are not lesser included offenses within the definition of aggravated robbery. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Since kidnapping, theft, and escape involve proof of different elements and are punishable as separate crimes, the defendant was not subjected to double jeopardy due to the multiple sentences imposed by the trial court. *Matthews v. Lockhart*, 726 F.2d 394 (8th Cir. 1984).

The crime of theft is not a lesser included offense of aggravated robbery under § 5-12-103; thus, the defendant can be sentenced for both of these offenses without violating § 5-1-110, regarding multiple punishments, or the double jeopardy clause of the Fifth Amendment to the U.S. Constitution. *Collins v. Lockhart*, 771 F.2d 1580 (8th Cir. 1985).

Theft is the wrongful appropriation of the victim's property while robbery is the threat of physical harm to the victim; the offenses are of a different nature; they are not of the same generic class and, consequently, theft is not a lesser offense included within robbery. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Ownership.

One committed larceny by taking the property of another with the intent to deprive the owner thereof, whether known or not. *Blackshare v. State*, 94 Ark. 548, 128 S.W. 549 (1910) (decision under prior law).

An allegation of ownership was material and had to be proved beyond a reasonable doubt, but ownership could be proved by direct and positive testimony or by circumstantial evidence. *Fletcher v. State*, 97 Ark. 1, 132 S.W. 918 (1910); *Rynes v. State*, 99 Ark. 121, 137 S.W. 800 (1911); *McLemore v. State*, 111 Ark. 457, 164 S.W. 119 (1914) (preceding decisions under prior law).

Correctly naming the owners was essential to the identification of the stolen property. *McIntosh v. State*, 108 Ark. 418, 157 S.W. 1154 (1913) (decision under prior law).

Evidence held sufficient to prove an allegation of joint ownership. *Johnson v. State*, 119 Ark. 124, 177 S.W. 428 (1915) (decision under prior law).

A special ownership which entitled one to the exclusive possession and control of the property stolen was sufficient to support an allegation of ownership. *State v. Esmond*, 135 Ark. 168, 204 S.W. 210 (1918) (decision under prior law) *Jackson v. State*, 37 Ark. App. 160, 826 S.W.2d 307 (1992).

Where the individual from whom money in an escrow account was obtained by false pretenses was an agent of his mother and aunt, the actual owners of the money, having such constructive possession of the money was sufficient to support an allegation of ownership by him. *Hoover v. State*, 262 Ark. 856, 562 S.W.2d 55 (1978) (decision under prior law).

Bankruptcy trustees right of possession and control satisfied the "owner" requirement of subdivision (a)(2). *Muhammed v. State*, 300 Ark. 112, 776 S.W.2d 825 (1989).

It is wholly immaterial who owns the stolen property if, at the time it is taken, it is in the possession and under the control of another person who is alleged to be the owner; possession and control in such a case constitutes special ownership. *Jackson v. State*, 37 Ark. App. 160, 826 S.W.2d 307 (1992).

Employee had a possessory interest in employer's money taken in theft. *Jackson v. State*, 37 Ark. App. 160, 826 S.W.2d 307 (1992).

Removal of timber from property defendant was purchasing but did not own was theft and was not protected by the doctrine of equitable conversion. *Higgins v.*

State, 326 Ark. 1030, 936 S.W.2d 740 (1996).

Property.

For cases discussing whether certain items constitute property, see *State v. Parker*, 34 Ark. 158 (1879); *Haywood v. State*, 41 Ark. 479 (1883); *Hindman v. State*, 72 Ark. 516, 81 S.W. 836 (1904); *Wm. Fait Co. v. Anderson*, 76 Ark. 237, 88 S.W. 905 (1905); *Crossland v. State*, 77 Ark. 544, 92 S.W. 776 (1906); *Coon v. State*, 109 Ark. 346, 160 S.W. 226 (1913) (preceding decisions under prior law).

A husband could be held guilty of stealing his wife's personal property. *Hunt v. State*, 72 Ark. 241, 79 S.W. 769 (1904) (decision under prior law).

Where defendant/debtor misappropriated the sale proceeds in which he had no legal or equitable interest, the debtor acted with malice in harming the creditor's property just as if he were a bank robber or an embezzler, and the fact that the debtor's conduct rose to the level of two separate criminal offenses under state law supported the conclusion that the debtor's act was malicious and the debt was not dischargeable in bankruptcy. *Mercantile Bank of Ark., N.A. v. Speers*, 244 Bankr. 142 (Bankr. E.D. Ark. 2000).

Receiving.

Rings which were obtained by theft as defined by this section were stolen within the meaning of § 5-36-106. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Selective Enforcement.

The Arkansas Employment Security Division's administrative policy of recommending criminal prosecution only when there has been a theft in excess of \$500 of unemployment benefits is representative of a valid administrative decision-making function, does not create a new statute and is not improper since the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. *Mitchell v. State*, 12 Ark. App. 263, 675 S.W.2d 373 (1984).

Sentence.

Where after the defendant entered a guilty plea to class C felony theft of property, for which the maximum sentence is 10 years, a sentence of 6 years in prison, with 2 years suspended on condition that she pay the sum of \$135,000 at the rate of

\$200 per month, beginning 60 days after her release from prison, and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not authorized. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

The dollar amount required for a conviction under subdivision (b)(2)(A) does not put a ceiling on the amount of restitution. *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996).

Separate Offenses.

The legislature did not intend to create a statute that would merge an instance of theft-by-receiving, under § 5-36-106, that is committed in one jurisdiction with an instance of theft-of-property, under this section, committed in a second jurisdiction; clearly, the two crimes are separate and distinct, and an interpretation of § 5-36-102 that the two offenses merge is particularly untenable when applied to factual circumstances wherein the theft crimes are not committed in the same criminal episode. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002).

Speedy Trial.

Where defendant stole a car in Pulaski County, then drove to Faulkner County and robbed a video store, the theft-by-receiving charge for which defendant was arrested in Faulkner County did not link to the distinct crimes, including the theft-of-property charge, for which defendant was subsequently arrested in Pulaski County, for purposes of the running of the speedy trial period in Pulaski County. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002).

Transfer of Property.

A transfer of property is essential for the completion of the crime of theft; on the other hand no transfer of property is required for the completion of the crime of robbery, only physical force or the threat of physical force is necessary. *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990).

Unauthorized Taking.

Subdivision (a)(1) makes no exceptions for temporary deprivation. *Moore v. State*, 299 Ark. 532, 773 S.W.2d 834 (1989); *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995).

Defendant who admitted at trial that

she took money out of her cash drawer and replaced it with a check and testified that she eventually replaced the money, admitted in open court to the unauthorized taking of the money from her cash drawer which amounted to a confession. *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995).

Value.

Under former section providing penalty for stealing animals, the value of the animal was immaterial. *Sanders v. State*, 55 Ark. 365, 18 S.W. 376 (1892) (preceding decisions under prior law).

It was not necessary to prove the value of cattle when stolen in order for one to be guilty of a felony stealing same. *Woodall v. State*, 200 Ark. 665, 140 S.W.2d 424 (1940); *Davis v. State*, 202 Ark. 948, 154 S.W.2d 812 (1941) (preceding decisions under prior law).

Evidence held sufficient to prove value of stolen property. *Davis v. State*, 202 Ark. 948, 154 S.W.2d 812 (1941) (decision under prior law) *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989).

Where value of stolen goods was above the statutory minimum for a felony, defendants were guilty of grand larceny even though there was some evidence that goods had been stolen from various places. *Richardson v. State*, 221 Ark. 567, 254 S.W.2d 448 (1953) (decision under prior law).

It was necessary to show that the market value of the property stolen was more than the statutory minimum for a felony conviction, otherwise, a conviction for a felony could not be sustained. *Hammond v. State*, 232 Ark. 692, 340 S.W.2d 280 (1960) (decision under prior law).

Despite failure to prove the value of vehicle when appellant was charged with grand larceny, conviction for misdemeanor based on proof of taking with intent to steal was proper. *Rogers v. State*, 250 Ark. 68, 464 S.W.2d 56 (1971) (decision under prior law).

In a prosecution for possession of stolen credit cards, where defendant's theory was that there was no evidence that the value of the credit cards exceeded minimum value for a felony conviction or that he acquired any property in excess of minimum value for a felony conviction by using credit cards, a violation which constituted only a misdemeanor, he was enti-

tled to present this theory of lesser offense to jury. *King v. State*, 250 Ark. 523, 465 S.W.2d 712 (1971) (decision under prior law).

Evidence as to value of stolen goods held to have failed to support a verdict of guilty of grand larceny. *Courtney v. State*, 252 Ark. 620, 480 S.W.2d 351 (1972) (decision under prior law).

Evidence held sufficient to show that value of stolen goods was in excess of statutory minimum for felony conviction. *Polk v. State*, 252 Ark. 320, 478 S.W.2d 738 (1972) (decision under prior law); *Bailey v. State*, 266 Ark. 260, 583 S.W.2d 62 (1979); *Watson v. State*, 271 Ark. App. 661, 609 S.W.2d 673 (1980); *Terry v. State*, 271 Ark. App. 715, 610 S.W.2d 272 (1981).

Defendant was entitled to question the owner about the maintenance of a stolen tractor since a jury might have concluded that the tractor had little value. *Sharron v. State*, 262 Ark. 320, 556 S.W.2d 438 (1977) (decision under prior law).

Testimony by the owner of stolen property held sufficient to establish a value of more than minimum value for a felony conviction for the coins taken, and it was not necessary that the owner should have bought and sold coins up to the day of trial in order to be competent to testify. *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

Testimony of the victim as to her opinion of the cumulative value of the property taken from her was admissible. *Watson v. State*, 271 Ark. App. 661, 609 S.W.2d 673 (1980).

Evidence of purchase price of property could be evidence of market value when admitted without objection, and the date of purchase of the articles in question was not too remote. *Terry v. State*, 271 Ark. App. 715, 610 S.W.2d 272 (1981).

Evidence held sufficient to sustain conviction under subdivision (b)(2). *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, cert. denied, 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2d 89 (1981).

Evidence held insufficient to establish value. *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981).

No minimum value is required for the jury's finding of theft as a misdemeanor. *O'Riordan v. State*, 281 Ark. 424, 665 S.W.2d 255 (1984).

Where deputy municipal clerk testified that \$4675 was missing, she was unable

to state from the daily journal sheets how much of the total amount was made up of cash or checks, and she testified that the money had not been recovered or returned to her office, there was substantial evidence of value in excess of \$2,500. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Stolen property in which victim has either a proprietary or possessory interest may be aggregated to determine grade of offense. *Phillips v. State*, 297 Ark. 368, 761 S.W.2d 933 (1988).

In trial for theft of car, owner's testimony with respect to the purchase price, her knowledge of what she owed on her car, the fact that it was three years old, and a photograph introduced showing the car to be in apparently excellent condition, were substantial evidence of the value of the car. *Stewart v. State*, 302 Ark. 35, 786 S.W.2d 827 (1990).

To prove the value of stolen merchandise it is necessary to have someone testify who has actual knowledge of the property's fair market value. *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990).

A security guard's testimony as to value, based on a price tag, is hearsay and is inadmissible to prove the value of stolen property. *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990).

Evidence held sufficient to support the court's finding that the value of the stolen property exceeded the amount required by subdivision (b)(2)(A) of this section. *Hardrick v. State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994) (decision under prior law).

Although witness did not testify specifically to the retail price of the merchandise at the time of the offense, she did testify to the value of the merchandise based on the wholesale cost, which was sufficient to establish the value of the property and therefore, sufficient to support the defendant's theft conviction. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

Evidence that the value of an automobile was over \$2,500.00 held sufficient where an invoice showed that the automobile was purchased for over \$19,000.00, the automobile was stolen just over one year after it was purchased, and photographs showed the automobile in good condition and without any obvious defects

or damage. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Although the preferred method of establishing value is through expert testimony, the price paid by an owner can be used to determine market value of property when the purchase is not too remote in time and bears a reasonable relation to present value. *Williams v. State*, 65 Ark. App. 176, 986 S.W.2d 123 (1999).

Evidence was sufficient to convict defendant of criminal attempt to commit theft of property where the victim testified as to the purchase price of the boat motor, his use and maintenance of it, and its condition at the time of the crime. *Wright v. State*, 80 Ark. App. 114, 91 S.W.3d 553 (2002).

One witness's testimony regarding minor improvements to a 1978 vehicle, coupled with 11 photographs, did not constitute substantial evidence of a value greater than \$ 500. *Reed v. State*, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 217 (May 1, 2003).

There was insufficient evidence to have convicted defendant of theft of property with a value greater than \$ 500 but less than \$ 2,500 where the only witness, a mechanic, stated car was not worth \$ 50, there was no evidence of what the victim had paid for the car, and the State's produced only photographs of the car at trial; however, there was sufficient evidence to support a conviction of misdemeanor theft, which carried a term of one year's imprisonment. *Reed v. State*, 353 Ark. 22, 109 S.W.3d 665 (2003).

Venue.

A defendant guilty of larceny was guilty in every county into which he carried the goods. *State v. Alexander*, 118 Ark. 357, 176 S.W. 315 (1915) (decision under prior law).

Cited: *McIntosh v. State*, 262 Ark. 7, 552 S.W.2d 649 (1977); *International Trading, Ltd. v. Bell*, 262 Ark. 244, 556 S.W.2d 420 (1977); *Wilson v. State*, 263 Ark. 764, 569 S.W.2d 87 (1978); *Chandler v. State*, 264 Ark. 175, 569 S.W.2d 660 (1978); *Kozal v. State*, 264 Ark. 587, 573 S.W.2d 323 (1978); *Sutton v. State*, 265 Ark. 645, 580 S.W.2d 195 (1979); *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979); *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979); *Elmore v. State*, 267 Ark. 952, 592 S.W.2d 124 (Ct. App.

1980); *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (Ct. App. 1979); *Klimas v. Mabry*, 599 F.2d 842 (8th Cir. 1979); *Miller v. State*, 269 Ark. 409, 601 S.W.2d 845 (1980); *Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980); *Thrasher v. State*, 270 Ark. 322, 604 S.W.2d 931 (1980); *Hammon v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980); *Jones v. State*, 270 Ark. 328, 605 S.W.2d 7 (1980); *Parker v. State*, 270 Ark. 897, 606 S.W.2d 746 (1980); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Terry v. Housewright*, 659 F.2d 879 (8th Cir. 1981); *Lingo v. State*, 271 Ark. 776, 610 S.W.2d 580 (1981); *Tolley v. State*, 1 Ark. App. 1, 611 S.W.2d 798 (1981); *Sutton v. State*, 1 Ark. App. 58, 613 S.W.2d 399 (1981); *Shelton v. State*, 275 Ark. 40, 627 S.W.2d 18 (1982); *State v. Jamison*, 277 Ark. 349, 641 S.W.2d 719 (1982); *Christian v. State*, 6 Ark. App. 138, 639 S.W.2d 78 (1982); *Wright v. Burton*, 279 Ark. 1, 648 S.W.2d 794 (1983); *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984); *Armstrong v. State*, 12 Ark. App. 143, 671 S.W.2d 772 (1984); *Daniels v. State*, 12 Ark. App. 251, 674 S.W.2d 949 (1984); *Mendenhall v. Skaggs Cos.*, 285 Ark. 236, 685 S.W.2d 805 (1985); *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985); *Tiggs v. State*, 16 Ark. App. 241, 700 S.W.2d 65 (1985); *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986); *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986); *National Bank of Commerce v. Hoffman*, 70 Bankr. 155 (Bankr. W.D. Ark. 1986); *Burris v. State*, 291 Ark. 157, 722 S.W.2d 858 (1987); *Hester v. Langston*, 297 Ark. 87, 759 S.W.2d 797 (1988); *Duhon v. State*, 299 Ark. 503, 774 S.W.2d 830 (1989); *Noel v. State*, 28 Ark. App. 158, 771 S.W.2d 325 (1989); *Hill v. State*, 303 Ark. 462, 798 S.W.2d 65 (1990); *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991); *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991); *State v. Hill*, 306 Ark. 375, 811 S.W.2d 323 (1991); *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996); *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996); *Coleman v. State*, 327 Ark. 381, 938 S.W.2d 845 (1997) (decision under prior law); *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997); *Greer v. State*, 77 Ark. App. 180, 72 S.W.3d 893 (2002); *McEntire v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 599 (Oct. 13, 2005).

5-36-104. Theft of services.

(a) A person commits theft of services if, with purpose to defraud:

(1) The person purposely obtains a service that he or she knows to be available only for compensation, by deception, threat, or other means to avoid payment for the service; or

(2) Having control over the disposition of a service to which he or she is not entitled, the person purposely diverts the service to his or her own benefit or to the benefit of another person not entitled to the service.

(b) In a circumstance in which payment is ordinarily made immediately upon the rendering of a service, absconding without payment or offer to pay gives rise to a presumption that the actor obtained the service with the purpose of avoiding payment.

(c) Theft of services is a:

(1) Class B felony if:

(A) The value of the service is two thousand five hundred dollars (\$2,500) or more;

(B) The service is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The service is obtained by threat, and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The theft of services involves a theft of a utility service that results in:

(i) Any contamination of a lines, pipe, waterline, meter, or other utility property; or

(ii) A spill, dumping, or release of any hazardous material into the environment;

(2) Class C felony if:

(A) The value of the service is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500); or

(B) The service is obtained by threat; or

(3) Class A misdemeanor if the theft of services:

(A) Involves a theft of a utility service that results in the destruction or damage to a line, pipe, waterline, meter, or any other property of the utility of less than five hundred dollars (\$500) in value; or

(B) Is otherwise committed.

(d)(1) In addition to any other fine that may be levied under § 5-4-201, any person found guilty of theft of services under this section is required to make full restitution to the utility from which the service was obtained if the theft of services involves the theft of a utility service such as a gas, electricity, water, telephone, or cable television service.

(2) For a prosecution brought under this subsection to enable the court to properly fix the amount of restitution, after appropriate investigation the prosecuting attorney shall recommend an amount that would make the utility whole with respect to:

(A) The value of the service received;

(B) The cost of repair of any damage to any:

(i) Line;

- (ii) Pipe;
- (iii) Waterline;
- (iv) Meter; or
- (v) Other utility property; and

(C) Any other measurable monetary damage directly related to the offense, including the expense of investigation.

(3) If the defendant disagrees with the recommendation of the prosecuting attorney, he or she is entitled to introduce evidence in mitigation of the amount recommended.

(4) The monetary judgment for restitution, as provided in this section, becomes a judgment against the offender and has the same force and effect as any other civil judgment recorded in this state.

History. Acts 1975, No. 280, § 2204; A.S.A. 1947, § 41-2204; Acts 1997, No. 1977, No. 360, § 9; 1983, No. 719, § 2; 518, § 1; 1999, No. 986, § 1.

CASE NOTES

ANALYSIS

Applicability.
Instructions.

Applicability.

Former section providing penalty for obtaining food or lodging with intent to defraud was intended to apply only to persons who obtained food or lodging for themselves and not to persons who agreed to pay for the accommodation of other persons. *Garrett v. State*, 169 Ark. 527, 275 S.W. 902 (1925) (decision under prior law).

Instructions.

Instruction that if the jury found that

the defendant had absconded without offering to pay, it was not conclusive as to the defendant's intent to defraud but could be considered along with all the other facts and circumstances in the case, did not constitute an improper inference of an intent to defraud. *Barnes v. State*, 261 Ark. 360, 548 S.W.2d 141 (1977) (decision under prior law).

Refusal to give requested instruction on the lesser included offense held error. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Cited: *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990).

5-36-105. Theft of property lost, mislaid, or delivered by mistake.

(a) A person commits theft of property lost, mislaid, or delivered by mistake if the person:

- (1) Comes into control of property of another person;
- (2) Retains or disposes of the property when the person knows the property to have been lost, mislaid, or delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property; and

(3) With the purpose of depriving any person having an interest in the property, the person fails to take a reasonable measure to restore the property to a person entitled to it.

(b) Theft of property lost, mislaid, or delivered by mistake is a:

- (1) Class D felony if the value of the property is one thousand dollars (\$1,000) or more;

(2) Class B misdemeanor if:

(A) The value of the property is less than one thousand dollars (\$1,000) but more than five hundred dollars (\$500); or

(B) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number; or

(3) Class C misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2205; A.S.A. 1947, § 41-2205; Acts 1997, No. 516, § 2; 1997, No. 518, § 2; 2003, No. 838, § 2.

Amendments. The 2003 amendment added (b)(2)(B)(ii).

CASE NOTES

Note: Some of the cases cited below were decided prior to the consolidation of offenses by § 5-36-102.

ANALYSIS

Elements.

Instructions.

Lesser included offenses.

Restoration to owner.

Elements.

The gist of the crime of theft of property delivered by mistake is the failure to take reasonable measures to restore the property to the person entitled thereto; this is distinct and separate from any element contained in the crime of theft of property by knowingly taking or exercising unauthorized control over the property of another, with the purpose of depriving the owner thereof. *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980).

Instructions.

Where information charged defendant

with theft of property under § 5-36-103, it was reversible error for court to instruct jury that it could consider guilt of defendant for violation of this section. *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980).

Lesser Included Offenses.

A violation of this section is not a lesser included offense under § 5-36-103. *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980).

Restoration to Owner.

The finder of a lost article was not guilty of larceny if he neither knew nor had the means of ascertaining the owner. *Brewer v. State*, 93 Ark. 479, 125 S.W. 127 (1910) (decision under prior law).

The finder of a lost article was guilty if he had the immediate means of knowing to whom it belonged, and appropriated it to his own use. *Penny v. State*, 109 Ark. 343, 159 S.W. 1127 (1913) (decision under prior law).

5-36-106. Theft by receiving.

(a) A person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person:

(1) Knowing that the property was stolen; or

(2) Having good reason to believe the property was stolen.

(b) As used in this section, "receiving" means acquiring possession, control, or title or lending on the security of the property.

(c) The following give rise to a presumption that a person knows or believes that property was stolen:

(1) The unexplained possession or control by the person of recently stolen property; or

(2) The acquisition by the person of property for a consideration known to be far below the property's reasonable value.

(d) It is a defense to a prosecution for the offense of theft by receiving that the property is received, retained, or disposed of with the purpose of restoring the property to the owner or another person entitled to the property.

(e) Theft by receiving is a:

(1) Class B felony if the value of the property is two thousand five hundred dollars (\$2,500) or more;

(2) Class C felony if:

(A) The value of the property is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500);

(B) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number; or

(C) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500); or

(3) Class A misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2206; 1977, No. 360, § 10; 1983, No. 719, § 3; A.S.A. 1947, § 41-2206; Acts 1997, No. 303, § 1; 1997, No. 516, § 3; 2003, No. 838, § 3.

Amendments. The 2003 amendment added (e)(2)(B)(ii).

RESEARCH REFERENCES

UALR L.J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

CASE NOTES

Note. Many of the cases cited below were decided prior to the consolidation of offenses by § 5-36-102.

ANALYSIS

Constitutionality.

Assistance of counsel.

Construction.

Conviction.

Double jeopardy.

Evidence.

Indictment or information.

Instructions.

Knowledge and intent.

Lesser included offense.

Ownership.

Possession.

Restoration of property.

Retention.

Separate offenses.

Value.

Venue.

Constitutionality.

The language of this section is not un-

constitutionally vague. *Newton v. State*, 271 Ark. 427, 609 S.W.2d 328 (1980), appeal dismissed, 454 U.S. 805, 102 S. Ct. 77, 70 L. Ed. 2d 74 (1981).

Subsection (c) is constitutional. *Grooms v. State*, 283 Ark. 224, 675 S.W.2d 353 (1984).

Assistance of Counsel.

Defendant's constitutional right to counsel held violated when court refused request for a continuance to obtain counsel. *Murdock v. State*, 291 Ark. 8, 722 S.W.2d 268 (1987).

Construction.

The legislature's 1995 amendment to the theft statute, § 5-36-103, which makes theft a Class C felony if the value of property taken exceeds \$500 rather than \$200, did not alter the requirements of this section. *Coleman v. State*, 327 Ark. 381, 938 S.W.2d 845 (1997).

Conviction.

Where defendant received the stolen

property only once, not on several occasions, only one conviction for theft by receiving should lie. *Watson v. State*, 295 Ark. 616, 752 S.W.2d 240 (1988).

Double Jeopardy.

Where, on appeal, case was reversed for new trial there was no double jeopardy and sentence to longer term at second trial than at first trial was not unconstitutional where the nature of the punishment was the same and the degree of the crime was not greater in the second than in the first verdict. *Fuller v. State*, 246 Ark. 704, 439 S.W.2d 801, cert. denied, 396 U.S. 930, 90 S. Ct. 259, 34 L. Ed. 2d 228 (1969) (decision under prior law).

The fact that defendant had been acquitted by a federal court of the charge of transporting stolen property across a state line did not prevent his trial in Arkansas on a charge of possessing stolen property although it was the same property involved in the federal action. *Journey v. State*, 257 Ark. 1007, 521 S.W.2d 210, cert. denied, 423 U.S. 866, 96 S. Ct. 127, 46 L. Ed. 2d 95 (1975) (decision under prior law).

Evidence.

Evidence held sufficient to show that defendant had possession and to show value of the property. *Scott v. State*, 205 Ark. 158, 167 S.W.2d 883 (1943) (decision under prior law).

Evidence held insufficient to support conviction. *Thompson v. State*, 207 Ark. 680, 182 S.W.2d 386 (1944) (decision under prior law); *Lee v. State*, 270 Ark. 892, 609 S.W.2d 3 (1980).

Evidence held sufficient to sustain conviction. *Carnal v. State*, 234 Ark. 1050, 356 S.W.2d 651, cert. denied, 371 U.S. 876, 83 S. Ct. 146, 9 L. Ed. 2d 114 (1962); *Paschal v. State*, 243 Ark. 329, 420 S.W.2d 73 (1967); *Evans v. State*, 252 Ark. 335, 478 S.W.2d 874 (1972) (preceding decisions under prior law); *Handy v. State*, 264 Ark. 909, 575 S.W.2d 693 (1979); *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980); *Arras v. State*, 3 Ark. App. 134, 623 S.W.2d 537 (1981); *Jones v. State*, 276 Ark. 116, 632 S.W.2d 414 (1982); *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983); *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983); *Tubbs v. State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986); *Austin v. State*, 26 Ark. App. 70, 760

S.W.2d 76 (1988); *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

There is no requirement that stolen property be introduced into evidence before a conviction for possession of it may be obtained. *Sims v. State*, 266 Ark. 922, 587 S.W.2d 604 (Ct. App. 1979) (decision under prior law).

Testimony by two witnesses that they were given drugs as well as cash by defendant in exchange for stolen property held admissible since the evidence tends to establish the entire criminal transaction, even though it had already been established that a purchase price in excess of minimum required for a felony conviction had been paid. *Vernon v. State*, 2 Ark. App. 305, 621 S.W.2d 17 (1981).

Evidence that on prior occasions the defendant had purchased property which he knew was stolen held properly admitted since under § 16-41-101, Rule 404(b), evidence of other acts under similar circumstances is admissible as tending to show a system, design or guilty knowledge in the case at hand where there is a question whether the crime was committed with guilty knowledge, and since the court gave cautionary instructions in which the jury was informed of the limited purpose for which the evidence might be considered. *Vernon v. State*, 2 Ark. App. 305, 621 S.W.2d 17 (1981).

Evidence was sufficient to establish that Cadillac automobile had a value of over \$2,500. *Coley v. State*, 302 Ark. 526, 790 S.W.2d 899 (1990).

Defendant's presence in the stolen vehicle, along with the incriminating fact of his flight from the police and his violent attempt to avoid capture, was sufficient evidence from which the jury could have found that the defendant had constructive possession of the car and knew or had reason to know it was stolen. *Riddle v. State*, 303 Ark. 42, 791 S.W.2d 708 (1990).

Evidence was insufficient to support a finding that defendant had actual or constructive possession of the vehicle. *Smith v. State*, 34 Ark. App. 150, 806 S.W.2d 391 (1991).

There was substantial evidence from which the trial court, as finder of fact, was able to determine that the defendant was guilty of theft by receiving. *Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994).

The defendant's brief presence in a stolen van and his violent outbursts upon

being taken into custody could not support a conviction under this section. *Avett v. State*, 325 Ark. 320, 928 S.W.2d 326 (1996).

A conviction for theft by receiving a stolen white utility van was reversed on the basis that there was insufficient evidence to show that the defendant was in actual possession of the stolen van as utility vans are not unique; therefore, the fact the defendant was seen in a white utility van that was similar to the stolen utility van discovered nearby some hours later, was insufficient to establish that he was seen in the stolen utility van. *Lindsey v. State*, 68 Ark. App. 70, 3 S.W.3d 346 (1999).

Where police found four-wheelers in defendant's driveway with VIN numbers that were reported stolen, defendant was properly convicted of three counts of theft by receiving. *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003).

There was sufficient evidence to support a conviction for theft by receiving where, although defendant's brother claimed he purchased a trailer in its present condition, no bill of sale was received, defendant failed to produce a registration at trial, defendant had possession of the trailer, and the trailer had marks identified by the owner; however, the state was not entitled to a presumption in subsection (c) because the trailer had not been recently stolen and there was no showing of the value of the trailer at the time it was discovered. *Doubleday v. State*, 84 Ark. App. 194, 138 S.W.3d 112 (2003).

Indictment or Information.

Upon an indictment for receiving a stolen hog, a defendant could not be convicted of receiving the pork. *Britton v. State*, 61 Ark. 15, 31 S.W. 569 (1895) (decision under prior law).

An indictment had to allege that the property was received with the "intent to deprive the true owner thereof." *State v. Bills*, 118 Ark. 44, 176 S.W. 114 (1915) (decision under prior law).

Indictment held sufficient. *Slinkeard v. State*, 193 Ark. 765, 103 S.W.2d 50 (1937) (decision under prior law).

Amendment of the information by striking out the charge of "disposal" of stolen goods and thereby eliminating and reducing the charge to the one charge of "possession" of stolen goods held proper. *Silas*

v. State, 232 Ark. 248, 337 S.W.2d 644 (1960), cert. denied, 365 U.S. 821, 81 S. Ct. 705, 5 L. Ed. 2d 698 (1961) (decision under prior law).

Upon an information for burglary and grand larceny, one could not be convicted for receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Instructions.

Failure to instruct the jury that it could find the defendant guilty of misdemeanor possession of stolen property held to be error. *Richie v. State*, 261 Ark. 7, 545 S.W.2d 638 (1977) (decision under prior law).

Court's use of an instruction taken from the Arkansas Model Criminal Instructions did not result in a comment upon the weight of evidence, where the instruction did not say that there was evidence the defendants were in unexplained possession of recently stolen property but only that evidence of such possession could be considered by the jury. *Newton v. State*, 271 Ark. 427, 609 S.W.2d 328 (1980), appeal dismissed, 454 U.S. 805, 102 S. Ct. 77, 70 L. Ed. 2d 74 (1981).

Knowledge and Intent.

A person in possession of stolen property could not be convicted of larceny upon a mere suspicion that he had knowledge that the person from whom he received the property was without authority to dispose of it. *Jones v. State*, 85 Ark. 360, 108 S.W. 223 (1908) (decision under prior law).

Possession of stolen property in itself was not sufficient to raise a presumption of guilty intent, but when the accused made a distinct claim of title thereto, it was evidence that he intended to convert it to his own use. *Douglass v. State*, 91 Ark. 492, 121 S.W. 923 (1909); *Cravens v. State*, 95 Ark. 321, 128 S.W. 1037 (1910) (preceding decisions under prior law).

The mere receipt and possession of stolen goods did not constitute the offense; it was essential that they were received with the knowledge that they had been stolen and with intent to deprive the owner thereof of his property. *Williams v. State*, 202 Ark. 951, 154 S.W.2d 809 (1941) (decision under prior law).

In order to constitute possession of stolen goods it was necessary that the person

possessing the stolen goods knew the property was stolen. *Patterson v. State*, 253 Ark. 393, 486 S.W.2d 19 (1972) (decision under prior law).

Evidence that numerous items were discovered on the defendants' property tended to show the motive, design, intent and scheme of the defendants to engage in illegal transactions and was admissible in a prosecution for possession of stolen property. *Wilkins v. State*, 261 Ark. 243, 547 S.W.2d 116 (1977).

Evidence held admissible as tending to show defendant's knowledge that the property in question had been stolen. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, cert. denied, 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 (1978); *Reeves v. Mabry*, 480 F. Supp. 529 (W.D. Ark. 1979), aff'd, 615 F.2d 489 (8th Cir. 1980).

It is clear that one may be in possession of stolen property or may actively participate in transporting it without being guilty of an offense, as long as there is no knowledge of the theft or good reason to believe the goods were stolen. *Utey v. State*, 266 Ark. 794, 586 S.W.2d 242 (Ct. App. 1979).

Evidence held sufficient to show that the defendant knew that he was not involved in a regular business transaction and that the defendant knew that the property was stolen. *Riley v. State*, 267 Ark. 916, 593 S.W.2d 45 (Ct. App. 1979).

Evidence held sufficient to find that the jury had a substantial basis for thinking defendant had many good reasons to believe the property had been stolen. *Fioranelli v. State*, 270 Ark. 470, 605 S.W.2d 13 (1980).

Evidence of the defendant's and his accomplice's plans to sell stolen property in the future was properly admitted to show a system, design, or guilty knowledge. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

The unexplained possession or control by a person of recently stolen property, or the acquisition by a person of property for a consideration known to be far below its reasonable value, gives rise to a presumption that he or she knows or believes that the property was stolen. *Jones v. State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987).

Lesser Included Offense.

The offense of knowingly receiving stolen property was not a lesser offense of

either burglary or larceny and therefore an indictment or information charging only the greater offense did not support a conviction of knowingly receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Possession of stolen property was not necessarily a lesser included offense in burglary or grand larceny, and acquittal on charges of burglary or grand larceny did not necessarily bar defendant's subsequent conviction for possession of the stolen goods. *Davis v. State*, 256 Ark. 538, 509 S.W.2d 547 (1974) (decision under prior law).

Ownership.

Where there was no competent evidence establishing the ownership of the property, it being a material element in the definition of crime of possession of stolen property, the conviction of stolen property was not proper. *King v. State*, 250 Ark. 523, 465 S.W.2d 712 (1971) (decision under prior law).

Evidence held sufficient to support a felony conviction where prior ownership of the alleged stolen guns was sufficiently established. *Kennedy v. State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995).

Possession.

Possession of property recently stolen, unexplained, was evidence of guilt to go to a jury for their consideration, but was not such evidence as to compel the jury to convict, unless it was not rebutted. *Boykin v. State*, 34 Ark. 443 (1879); *Shepherd v. State*, 44 Ark. 39 (1884); *Reed v. State*, 54 Ark. 621, 16 S.W. 819 (1891); *Blankenship v. State*, 55 Ark. 244, 18 S.W. 54 (1891); *Gunter v. State*, 79 Ark. 432, 96 S.W. 181 (1906); *Threadgill v. State*, 207 Ark. 478, 181 S.W.2d 236 (1944) (preceding decisions under prior law).

The possession by a party of stolen goods was a fact from which his complicity in the larceny could be inferred, but this fact standing alone was not sufficient to sustain a conviction; it had to appear that the property was recently stolen, the possession had to be unexplained, and in some form involve an assertion of property in the possessor. *Shepherd v. State*, 44 Ark. 39 (1884) (decision under prior law).

The acceptability of the accused's expla-

nation of the possession of stolen property was a matter for the jury to decide. *Jackson v. State*, 101 Ark. 473, 142 S.W. 1153 (1912) (decision under prior law).

Where possession of the stolen property was traced to defendant a short time after her disappearance, instruction that such possession, if unexplained, should be considered as a circumstance in determining guilt, was proper. *Stard v. State*, 204 Ark. 247, 161 S.W.2d 756 (1942) (decision under prior law).

The possession of recently stolen property, if not satisfactorily explained to the jury, is sufficient to sustain a conviction. *Holcomb v. State*, 217 Ark. 407, 230 S.W.2d 487 (1950); *Fields v. State*, 219 Ark. 373, 242 S.W.2d 639 (1951) (preceding decisions under prior law); *Patterson v. State*, 253 Ark. 393, 486 S.W.2d 19 (1972); *Riley v. State*, 267 Ark. 916, 593 S.W.2d 45 (Ct. App. 1979); *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Where the missing property was found in defendant's possession and no satisfactory explanation, consistent with innocence, was given by him, the evidence against the defendant amounted to more than a suspicion of guilt. *Hammond v. State*, 232 Ark. 692, 340 S.W.2d 280 (1960) (decision under prior law).

Unexplained possession or control is not eliminated simply whenever the possessor gives a plausible explanation for his possession. *Core v. State*, 265 Ark. 409, 578 S.W.2d 581 (1979).

Constructive possession occurs when the accused maintains control or the right to control property and when stolen property is found at a location which is under the joint control of the accused and other persons, it is sufficient to prove possession if there are additional factors which would link the accused to the possession. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

It is not necessary that the state prove the accused had actual possession of stolen property; it is enough to prove he had constructive possession or the right to control. *Jones v. State*, 276 Ark. 116, 632 S.W.2d 414 (1982).

Possession of recently stolen property is prima facie evidence of the guilt of the party in whose possession the property is found in cases of burglary, larceny and possession of stolen property, unless satisfactorily accounted for by the evidence.

Ward v. State, 280 Ark. 353, 658 S.W.2d 379 (1983).

An accused's unexplained possession or control of recently stolen property is prima facie evidence of his guilt of theft by receiving. *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989).

Being a passenger in a stolen vehicle is not, standing alone, enough to establish constructive possession of the vehicle. *Avett v. State*, 325 Ark. 320, 928 S.W.2d 326 (1996).

Defendant's recurring possession of jewelry later discovered to be stolen held sufficient to sustain conviction. *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997).

Restoration of Property.

Keeping stolen property in sight for purpose of returning to owner if he should demand same was not a defense, but only a point to stress before the jury. *Fields v. State*, 219 Ark. 373, 242 S.W.2d 639 (1951) (decision under prior law).

The defense of receiving property with the purpose of restoring it to the owner is not applicable when property is returned when the defendant was confronted; the purpose must exist at the time of the purchase and it cannot be based upon a general policy of the buyer to relinquish property purchased by him to a claimant who can identify it as his to the satisfaction of the buyer. *Core v. State*, 265 Ark. 409, 578 S.W.2d 581 (1979).

Retention.

Retaining stolen property is clearly a continuing offense. *State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978), cert. denied, 441 U.S. 964, 99 S. Ct. 2412, 60 L. Ed. 2d 1069 (1979).

Separate Offenses.

Since burglary is a separate offense from theft by receiving, a defendant who had been convicted of burglary was not twice placed in jeopardy by being convicted of theft by receiving property stolen at the time of the burglary. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977).

Theft and aggravated robbery are separate offenses for which a defendant may be convicted even though they arise out of one incident. *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989).

The legislature did not intend to create a statute that would merge an instance of

theft-by-receiving under this section that is committed in one jurisdiction with an instance of theft-of-property under § 5-36-103 committed in a second jurisdiction; clearly, the two crimes are separate and distinct, and an interpretation of § 5-36-102 that the two offenses merge is particularly untenable when applied to factual circumstances wherein the theft crimes are not committed in the same criminal episode. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002).

Value.

Evidence of the value of the car was necessary to sustain a felony conviction of the possession of a stolen automobile, there being no presumption that the value of such a car was a matter of common knowledge, within the experience of any person, from which the jury could infer that it was worth more than thirty-five dollars. *Rogers v. State*, 248 Ark. 696, 453 S.W.2d 393 (1970) (decision under prior law).

Value as used in this section means the market value of the property at the time and place of the offense, but if the market value cannot be ascertained, value is the cost of replacing the property within a reasonable time. *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979).

The cost of the owner a number of years prior to the offense cannot be substantial evidence that the property had a market value of more than the minimum value for a felony conviction. *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979).

Evidence held insufficient to prove that the property was worth more than minimum value for a felony conviction. *Riley v. State*, 267 Ark. 916, 593 S.W.2d 45 (Ct. App. 1979).

The purchase price paid by the owner is admissible as a factor for the jury to consider in determining market value, when it is not too remote in time and bears a reasonable relation to present value. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Jones v. State*, 276 Ark. 116, 632 S.W.2d 414 (1982).

Evidence of a market value exceeding minimum value for a felony conviction held sufficient. *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Jones v. State*, 276 Ark. 116, 632 S.W.2d 414 (1982).

Court property allowed the owner of the goods that were stolen to testify as to the

price he paid for them a number of years prior to the theft, since the purchase price was not too remote and it bore a reasonable relation to the present value of the goods. *Jones v. State*, 6 Ark. App. 7, 636 S.W.2d 880 (1982).

Where a gold and silver dealer testified that the stolen gold rings which defendant attempted to sell him were worth far more than minimum value for a felony conviction, his testimony was properly admitted as a positive statement of value by one qualified as an expert, and the fact that he had not accurately weighed the rings nor refreshed his memory as to the market value of gold on the date of the crime affected only the weight to be given his testimony and not its admissibility. *Jones v. State*, 6 Ark. App. 7, 636 S.W.2d 880 (1982).

Under subdivision (e)(2)(c) of this section, the State is not required to establish the value of the weapon in order to obtain a conviction. *Gregory v. State*, 9 Ark. App. 242, 657 S.W.2d 570 (1983).

Venue.

The crime of receiving stolen property was committed where the property was received, though it was stolen in another state, and it was immaterial whether the property was taken in a state which made the taking larceny. *Thompson v. State*, 207 Ark. 680, 182 S.W.2d 386 (1944) (decision under prior law).

Cited: *Wilkins v. State*, 261 Ark. 243, 547 S.W.2d 116 (1977); *Brewer v. State*, 261 Ark. 732, 551 S.W.2d 218 (1977); *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977); *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979); *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979); *Bateman v. State*, 265 Ark. 307, 578 S.W.2d 216 (1979); *Reeves v. Mabry*, 615 F.2d 489 (8th Cir. 1980); *Tolley v. State*, 1 Ark. App. 1, 611 S.W.2d 798 (1981); *Clinkscale v. State*, 13 Ark. App. 149, 680 S.W.2d 728 (1984); *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986); *Fallon v. State*, 24 Ark. App. 119, 749 S.W.2d 686 (1988); *Adams v. State*, 25 Ark. App. 212, 755 S.W.2d 579 (1988); *Williams v. State*, 26 Ark. App. 62, 760 S.W.2d 71 (1988) (decision under prior law); *Campbell v. State*, 300 Ark. 606, 780 S.W.2d 567 (1989); *Johnson v. State*, 313 Ark. 308, 854 S.W.2d 336 (1993); *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994).

5-36-107. Theft of a trade secret.

(a) A person commits theft of a trade secret if, with a purpose to deprive the owner of the control of a trade secret, the person:

- (1) Obtains or discloses to an unauthorized person a trade secret; or
- (2) Without authority, makes or causes to be made a copy or an article representing a trade secret.

(b) Theft of a trade secret is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2207;
A.S.A. 1947, § 41-2207.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 4 UALR L.J. 581.

CASE NOTES

Cited: State v. Hill, 306 Ark. 375, 811 S.W.2d 323 (1991).

5-36-108. Unauthorized use of a vehicle.

(a) A person commits unauthorized use of a vehicle if the person knowingly takes, operates, or exercises control over another person's vehicle without consent of the owner.

(b) Unauthorized use of a vehicle is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2208;
A.S.A. 1947, § 41-2208.

CASE NOTES

Cited: Branham v. State, 274 Ark. 109, 623 S.W.2d 1 (1981); Greer v. State, 77 Ark. App. 180, 72 S.W.3d 893 (2002).

5-36-109 — 5-36-114. [Reserved.]**5-36-115. Theft of leased, rented, or entrusted personal property — False report of wealth or credit.**

(a) A person is guilty of theft and subject to a punishment prescribed by § 5-36-103 if the person:

- (1) Intentionally, fraudulently, or by false pretense takes, carries, leads, drives away, destroys, sells, secretes, converts, or appropriates in any wrongful manner any personal property of another person that is leased, rented, or entrusted to the actor; or

(2) Falsely reports of his or her wealth or mercantile credit and by the false report fraudulently obtains possession of personal property or the labor or service of another person.

(b) The amount involved in the theft is deemed to be the highest value by any reasonable standard of the property or service that the person stole or attempted to steal.

(c) It is prima facie evidence of intent to commit theft if a person who has leased or rented the personal property of another person:

(1) Fails to return or make an arrangement acceptable with the lessor to return the personal property to its owner within five (5) days, excluding Saturday, Sunday, or a state or federal holiday, after proper notice following the expiration of the lease or rental agreement; or

(2) Presents identification to the lessor or renter of the personal property that is false, fictitious, or not current with respect to name, address, place of employment, or other appropriate item.

(d) Proper notice by the lessor shall consist of a written demand addressed and mailed by certified or registered mail to the lessee at the address given at the time of making the lease or rental agreement.

(e) The following factors constitute an affirmative defense to prosecution for theft:

(1) That the lessee accurately stated his or her name and address at the time of rental;

(2) That the lessee's failure to return the item at the expiration date of the rental contract was lawful;

(3) That the lessee failed to receive the lessor's notice personally unless notice was waived; and

(4) That the lessee returned the personal property to the owner or lessor within forty-eight (48) hours of the commencement of prosecution, together with any charges for the overdue period and the value of damages to the personal property, if any.

(f)(1) For any lease or rental contract of twenty-five dollars (\$25.00) or more, the lessee may waive the notice required in subsection (c) of this section by signing a statement contained in the lease agreement or rental agreement. The waiver shall require a separate signature of the lessee.

(2) The form of the waiver shall be substantially as follows:

“WAIVER OF NOTICE

I acknowledge that I shall be subject to criminal penalties for theft under § 5-36-115 for: (a) failure to return or make arrangements acceptable to the lessor to return the property covered by this contract within five (5) days, excluding Saturday, Sunday, or state or federal holidays; or (b) presenting identification to the lessor or renter which is false, fictitious, or not current with respect to name, address, place of employment, or other appropriate items. I hereby waive my right to notice by certified or registered mail before such actions constitute prima facie evidence of an intent to commit theft.

Signature

Date”

History. Acts 1977, No. 387, § 1; 1985, No. 883, § 1; A.S.A. 1947, § 41-2209; Acts 1989, No. 720, § 1.

CASE NOTES

ANALYSIS

Affirmative defense.

Intent.

Notice.

Affirmative Defense.

This section clearly contemplates that all of the listed factors must be present in order to establish an affirmative defense. *Parks v. State*, 24 Ark. App. 139, 750 S.W.2d 65 (1988); *Cox-Hilstrom v. State*, 58 Ark. App. 109, 948 S.W.2d 409 (1997).

Intent.

Subsection (c) merely provides a method by which the State may prove a prima

facie case of intent to commit theft and does not restrict the method the State may use to prove commission of the offense. *Cox-Hilstrom v. State*, 58 Ark. App. 109, 948 S.W.2d 409 (1997).

Notice.

The owner's notice is not an element of the offense of theft of leased personal property. *Cox-Hilstrom v. State*, 58 Ark. App. 109, 948 S.W.2d 409 (1997).

Cited: *Wrather v. State*, 1 Ark. App. 155, 613 S.W.2d 601 (1981); *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

5-36-116. Shoplifting.

(a)(1) A person engaging in conduct giving rise to a presumption under § 5-36-102(b) may be detained in a reasonable manner and for a reasonable length of time by a law enforcement officer, merchant, or merchant's employee in order that recovery of a good or may be effected.

(2) The detention by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(b)(1) If sufficient notice has been posted to advise patrons that an antishoplifting or inventory control device is being utilized, the activation of an antishoplifting or inventory control device as a result of a person's exiting an establishment or a protected area within the establishment constitutes reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator.

(2) Any detention under subdivision (b)(1) of this section shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the antishoplifting or inventory control device or for the recovery of a good.

(3) A detention under subdivision (b)(1) of this section by a law enforcement officer, merchant, or merchant's employee does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(c) As used in this section, "antishoplifting or inventory control device" means a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment

or similar enclosure or from a protected area within a mercantile establishment or similar enclosure.

(d)(1) Upon probable cause for believing a suspect has committed the offense of shoplifting, a law enforcement officer may arrest the person without a warrant.

(2) The law enforcement officer, merchant, or merchant's employee who has observed the person accused of committing the offense of shoplifting shall provide a written statement that serves as probable cause to justify the arrest.

(3) The accused person shall be brought immediately before a magistrate and afforded an opportunity to make a bond or recognizance as in other criminal cases.

History. Acts 1957, No. 50, § 4; 1971, No. 164, § 1; 1975, No. 458, § 1; 1975, No. 928, § 15; 1983, No. 551, § 1; 1985, No. 404, § 1; A.S.A. 1947, § 41-2251; Acts 2005, No. 1994, § 246.

Amendments. The 2005 amendment substituted "law enforcement officer" for "peace officer" throughout this section.

CASE NOTES

ANALYSIS

Purpose.
Detention.
Instructions.

Purpose.

Purpose of this section is to create a presumption that concealment on the person is prima facie evidence of willful concealment. *Safeway Stores, Inc. v. Gross*, 240 Ark. 206, 398 S.W.2d 669 (1966).

Detention.

Although plaintiff was detained pursuant to subsection (a) of this section, there was insufficient evidence to show the detention or imprisonment requirement of the tort of false arrest. *Limited Stores, Inc. v. Wilson-Robinson*, 317 Ark. 80, 876 S.W.2d 248 (1994).

Instructions.

Instruction that the finding of unpurchased goods or merchandise willfully concealed upon the person or among

the belongings of such person shall be prima facie evidence of concealment held reversible error. *Safeway Stores, Inc. v. Gross*, 240 Ark. 206, 398 S.W.2d 669 (1966).

Where the challenged instruction merely set out the law applicable to the issue of false arrest, and where the instruction did not advise the jury that any presumption had been established by the evidence adduced at trial, but to the contrary, advised the jury that if they found the facts to meet the requisites for the statutory presumption, then their verdict should be for defendant, the instruction given was not erroneous. *Dawson v. Pay Less Shoes # 904 Co.*, 269 Ark. 23, 598 S.W.2d 83 (1980).

Cited: *Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984); *Mendenhall v. Skaggs Cos.*, 285 Ark. 236, 685 S.W.2d 805 (1985); *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986); *Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989).

5-36-117. [Repealed.]

Publisher's Notes. This section, concerning possession of more than 10 pounds of mercury without evidence of title, was repealed by Acts 2005, No. 1994,

§ 540. The section was derived from Acts 1969, No. 84, §§ 1, 2; A.S.A. 1947, §§ 41-2252, 41-2253.

5-36-118. [Repealed.]

Publisher's Notes. This section, concerning embezzlement by an officer or employee of certain institutions, was repealed by Acts 2005, No. 1994, § 514. The section was derived from Acts 1893, No.

159, § 3, p. 273; 1893, No. 178, § 3, p. 314; 1893, No. 188, § 3, p. 340; C. & M. Dig., § 9330; Pope's Dig., § 12518; A.S.A. 1947, § 7-108.

5-36-119. [Repealed.]

Publisher's Notes. This section, concerning construction of Acts 1997, No. 516, was repealed by Acts 2005, No. 1994,

§ 529. The section was derived from Acts 1997, No. 516, § 5.

5-36-120. Theft of motor fuel.

(a) A person commits the offense of theft of motor fuel if the person knowingly operates an automobile or other related vehicle after placing motor fuel in the automobile or other related vehicle at a:

(1) Service station, filling station, garage, or other business where motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the service station, filling station, gasoline station, garage, or any other business where motor fuel is offered for sale at retail, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel; or

(2) Location owned by a political subdivision or nonprofit entity whether or not the motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the political subdivision or nonprofit entity, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel.

(b) Theft of motor fuel is a Class A misdemeanor.

(c)(1)(A) In addition to a penalty in subsection (b) of this section, a person who pleads guilty or nolo contendere to or is found guilty of theft of motor fuel shall have his or her driver's license suspended by the court under § 27-16-907(a) for a period of not more than six (6) months.

(B) However, if the person's driver's license has previously been suspended for theft of motor fuel the court shall suspend the person's driver's license for not less than one (1) year.

(2)(A) The court shall immediately take possession of any suspended driver's license and forward it to the Office of Driver Services.

(B) The office shall notify the licensee of the suspension and of an opportunity to request a hearing to determine if a restricted permit should be issued during the time of suspension.

(d) Any service station, filling station, garage, or other location where motor fuel is offered for sale at retail shall prominently display on each face of a retail product dispenser a sign that contains the following: "THEFT OF MOTOR FUEL IS A CLASS A MISDEMEANOR AND CARRIES A MAXIMUM PENALTY OF ONE (1) YEAR IN JAIL, \$1000 FINE, AND A ONE (1) YEAR SUSPENSION OF YOUR DRIVER'S LICENSE."

(e) As used in this section:

(1) "Nonprofit entity" means an organization that is exempt from income tax under 26 U.S.C. § 501(a); and

(2) "Political subdivision" means an agency, department, or other governing body of the state.

History. Acts 2001, No. 745, § 2; 2005, No. 900, § 1.

Amendments. The 2005 amendment inserted the subdivision (1) designation in

(a) and made related changes; added (a)(2) and present (e); and substituted "other location" for "other business" in present (d).

5-36-121. Theft of recyclable materials.

(a)(1) No person shall divert to personal use any recyclable material valued at fifty dollars (\$50.00) or more and placed in a container as a part of a recycling program without the consent of the generator or the collector of the recyclable material or the person owning or operating the container as a part of the recycling program.

(2)(A) For a first offense under subdivision (a)(1) of this section, a person shall be issued a citation that is a warning citation and no court appearance is required and no penalty shall be imposed by the court.

(B) A record of each warning citation issued shall be maintained and for any subsequent offense, the offender is subject to a penalty prescribed.

(3) Any person who pleads guilty or nolo contendere to or is found guilty of violating subdivision (a)(1) of this section for a subsequent offense is guilty of a Class C misdemeanor.

(b)(1) No person shall divert to commercial use any recyclable material placed in a container as a part of a recycling program without the consent of the generator or the collector of the recyclable material or the person owning or operating the container as a part of the recycling program.

(2) Any person who pleads guilty or nolo contendere to or is found guilty of violating a provision of subdivision (b)(1) of this section is guilty of a Class A misdemeanor.

History. Acts 2001, No. 1720, § 1.

Recyclable materials collection centers,

Cross References. Disposal of solid waste, § 8-6-201 et seq. § 8-6-720.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-36-122. Motion picture piracy.

(a) As used in this section:

(1) "Audiovisual recording function" means the capability of a device to record or transmit an image, a sound, or any part of an image or sound;

(2) "Motion picture" means any series of images projected on a film screen or displayed in or on any other matter in successive and slightly changed positions so as to produce the optical effect of a continuous picture in which the images move; and

(3) "Motion picture theater" means any movie theater, screening room, or other venue utilized primarily for the exhibition of a motion picture that has been produced for commercial distribution.

(b) A person commits motion picture piracy if, without the consent of the motion picture theater owner or lessee, the person operates the audiovisual recording function of any device in a motion picture theater while a motion picture is being exhibited with the purpose of recording an image or sound of the motion picture.

(c)(1)(A) An owner, a lessee, or an employee of a motion picture theater who reasonably suspects a person of committing motion picture piracy in the motion picture theater may detain the person in a reasonable manner and for a reasonable length of time in order to identify the person and to transfer custody of the person to a law enforcement officer.

(B) A detention conducted in a reasonable manner and for a reasonable length of time by an owner, a lessee, or an employee of the motion picture theater does not render the owner, lessee, or employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(2)(A) Upon detention of a person under this section, an owner, a lessee, or an employee of the motion picture theater shall promptly and without delay contact a law enforcement agency, and the owner, lessee, or employee of the motion picture theater shall release the person to the custody of the responding law enforcement officer.

(B) The owner, lessee, or employee of a motion picture theater who observed the person reasonably suspected of committing the offense of motion picture piracy shall provide a written statement to the responding law enforcement officer and the written statement serves as probable cause to justify an arrest.

(3)(A) A law enforcement officer may arrest a person without a warrant upon probable cause for believing the person has committed the offense of motion picture piracy.

(B) Upon arrest by a law enforcement officer, the arrested person shall be afforded the opportunity to make a bond or recognizance as in other criminal cases.

(d) This section does not prevent any investigative officer, law enforcement officer, protective officer, intelligence officer, employee, or agent of a local municipal, county, state, or federal government from

operating any audiovisual recording device in a motion picture theater as part of a lawfully authorized investigative, law enforcement, protective, or intelligence gathering activity.

(e) Motion picture piracy is a Class A misdemeanor.

History. Acts 2005, No. 1932, § 1.

SUBCHAPTER 2 — THEFT OF PUBLIC BENEFITS

SECTION.

5-36-201. Definitions.

5-36-202. Theft of public benefits.

5-36-203. Penalties.

5-36-204. Terms of imprisonment —
Fines.

SECTION.

5-36-205. Ineligibility for programs.

5-36-206. Deputizing attorneys to prosecute offenses.

A.C.R.C. Notes. References to “this chapter” in subchapter 1 may not apply to this subchapter which was enacted subsequently.

Cross References. Claims for benefits, § 5-55-301.

Illegal food coupons, § 5-55-201 et seq.

Medicaid Fraud, § 5-55-101 et seq.

Effective Dates. Acts 1997, No. 1058, § 33: July 1, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the United States Congress has amended the laws pertaining to certain federally funded public assistance programs; that these programs are crucial to the life and health of many needy citizens of the State of Arkansas who otherwise will be unable to obtain food, clothing, shelter, or medical care; that federal law mandates participating states to implement new public assistance programs on or before July 1, 1997, or forfeit federal funding necessary for such programs; that this act so provides. Therefore, an emergency is declared to exist and this act

being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect on July 1, 1997.”

Acts 1999, No. 1567, § 28: July 1, 1999. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the United States Congress has amended the laws pertaining to certain federally funded public assistance programs; that these programs are crucial to the life and health of many needy citizens of the State of Arkansas who otherwise will be unable to obtain food, clothing, shelter, or medical care; that federal funds have already been appropriated for this program and any delays could work irreparable harm upon the proper administration of essential governmental programs and the State of Arkansas may risk forfeiture of the federal funding; that this act so provides. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect on July 1, 1999.”

5-36-201. Definitions.

As used in this subchapter:

(1) “Misrepresentation” means any manifestation by a word or other conduct by a person to another person that, under the circumstances, amounts to an assertion not in accordance with fact; and

(2) “Public benefit” means any federal or state funds, or any combination of federal or state funds, in cash or in kind, whose distribution to the public is administered by an agency of the State of Arkansas.

History. Acts 1993, No. 320, § 1.

5-36-202. Theft of public benefits.

(a) A person commits theft of public benefits if the person:

(1) Obtains or retains a public benefit from the Department of Health and Human Services or any other state agency administering the distribution of a public benefit:

(A) By means of any false statement, misrepresentation, or impersonation; or

(B) Through failure to disclose a material fact used in making a determination as to the person's qualification to receive a public benefit; or

(2) Receives, retains, or disposes of a public benefit knowing or having reason to know that the public benefit was obtained in violation of this subchapter.

(b) Presentation of false or fictitious information or failure to disclose a material fact in the process of obtaining or retaining public benefits is prima facie evidence of intent to commit theft of public benefits.

History. Acts 1993, No. 320, §§ 2, 3.

5-36-203. Penalties.

Theft of public benefits is a:

(1) Class B felony if the value of the public benefit is two thousand five hundred dollars (\$2,500) or more;

(2) Class C felony if the value of the public benefit is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500); or

(3) Class A misdemeanor if the value of the public benefit is five hundred dollars (\$500) or less.

History. Acts 1993, No. 320, § 4; 2005, substituted "five hundred dollars (\$500)"
No. 1994, § 463. for "two hundred dollars (\$200)" in

Amendments. The 2005 amendment present (2) and (3).

5-36-204. Terms of imprisonment — Fines.

(a) In addition to an extended term of imprisonment provided by § 5-4-501 for a habitual offender, any person who pleads guilty or nolo contendere or is found guilty of violating § 5-36-202(a) shall be imprisoned:

(1) For no less than seven (7) days for the second offense of any felony or misdemeanor set forth in § 5-36-203 occurring within five (5) years of the first offense of any felony or misdemeanor set forth in § 5-36-203;

(2) For no less than ninety (90) days for a third offense of any felony or misdemeanor set forth in § 5-36-203 occurring within five (5) years of the first offense of any felony or misdemeanor set forth in § 5-36-203; and

(3) For at least one (1) year for a fourth or subsequent offense of any felony or misdemeanor set forth in § 5-36-203 occurring within five (5) years of the first offense of any felony or misdemeanor set forth in § 5-36-203.

(b) In addition to restitution, any person who pleads guilty or nolo contendere or is found guilty of a felony or misdemeanor set forth in § 5-36-203 shall be fined no less than:

- (1) One hundred fifty dollars (\$150) for the first offense;
- (2) Four hundred dollars (\$400) for a second offense occurring within five (5) years of the first offense; and
- (3) Nine hundred dollars (\$900) for a third or subsequent offense occurring within five (5) years of the first offense.

History. Acts 1993, No. 320, §§ 5, 6.

5-36-205. Ineligibility for programs.

In addition to a penalty set forth in this subchapter:

(1) Except as set forth in subdivision (4) of this section, any recipient of a food stamp who pleads guilty or nolo contendere to or is found guilty of a violation set forth in this subchapter is ineligible for further participation in the food stamp program, as follows:

(A) For a period of one (1) year upon the first occasion of an offense pertaining to the receipt of a food stamp;

(B) For a period of two (2) years upon the second occasion of an offense pertaining to the receipt of a food stamp; and

(C) Permanently upon the third occasion of an offense pertaining to the receipt of a food stamp;

(2) Any recipient of transitional employment assistance who pleads guilty or nolo contendere to or is found guilty of a violation set forth in this subchapter is ineligible for further participation in the Transitional Employment Assistance Program, as follows:

(A) For a period of one (1) year upon the first occasion of an offense pertaining to the receipt of transitional employment assistance;

(B) For a period of two (2) years upon the second occasion of an offense pertaining to the receipt of transitional employment assistance; and

(C) Permanently upon the third occasion of an offense pertaining to the receipt of transitional employment assistance;

(3) Any recipient of supplemental security income who pleads guilty or nolo contendere to or is found guilty of a violation set forth in this subchapter is ineligible for further participation in the Supplemental Security Income Program, as follows:

(A) For a period of one (1) year upon the first occasion of an offense pertaining to the receipt of supplemental security income;

(B) For a period of two (2) years upon the second occasion of an offense pertaining to the receipt of supplemental security income; and

(C) Permanently upon the third occasion of an offense pertaining to the receipt of supplemental security income; and

(4) An individual is ineligible to participate in the food stamp program as a member of any household for a ten-year period if the individual is found by the Department of Health and Human Services to have made or is found guilty of or pleads guilty or nolo contendere to having made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple benefits simultaneously.

History. Acts 1993, No. 320, § 7; 1995, No. 1174, § 1; 1997, No. 1058, § 28; 1999, No. 1567, § 2.

1999 amendment of Arkansas Personal Responsibility and Public Assistance Reform Act, § 20-76-438.

Cross References. Purpose behind

5-36-206. Deputizing attorneys to prosecute offenses.

The prosecuting attorney may deputize an attorney of the Office of Chief Counsel of the Department of Health and Human Services or the appropriate state agency to prosecute an offense under this subchapter.

History. Acts 1993, No. 320, § 8.

SUBCHAPTER 3 — WIRELESS SERVICES THEFT PREVENTION LAW

SECTION.

5-36-301. Title.

5-36-302. Definitions.

5-36-303. Theft of wireless service.

5-36-304. Facilitating theft of wireless service by manufacture, distribution, or possession

SECTION.

of devices for theft of wireless services.

5-36-305. Restitution.

5-36-306. Civil remedy.

5-36-307. Scanners not prohibited.

A.C.R.C. Notes. References to “this chapter” in subchapter 1 may not apply to this subchapter which was enacted subsequently.

Cross References. Interception and recording, § 5-60-120.

5-36-301. Title.

This subchapter may be cited as the “Wireless Services Theft Prevention Law”.

History. Acts 1997, No. 1310, § 1.

5-36-302. Definitions.

As used in this subchapter:

(1) “Manufacture of a wireless device” means to produce, activate, or assemble a wireless device or to modify, alter, program, or reprogram a device to be capable of acquiring or facilitating the acquisition of a wireless service without the consent of the wireless service provider;

(2)(A) “Wireless device” means any type of instrument, device, machine, or equipment that is capable of transmitting or receiving telephonic, electronic, or radio communications and that is capable, or has been altered, modified, programmed, or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable of acquiring or facilitating the acquisition of a wireless service without the consent of the wireless service provider.

(B) “Wireless device” includes, but is not limited to, a phone altered to obtain service without the consent of the wireless service provider, a tumbler phone, counterfeit or clone phone, tumbler microchip, counterfeit or clone microchip, or other instrument capable of disguising its identity or location or of gaining access to a communications system operated by a wireless service provider;

(3) “Wireless service” includes, but is not limited to, any service provided for a charge or compensation to facilitate the origination, transmission, emission, or reception of a sign, signals, data, writing, image or sound, or intelligence of any nature by telephone, including a cellular, personal communication service, wireless, radio, electromagnetic, photoelectronic, or photo-optical system; and

(4) “Wireless service provider” means a person or entity providing a commercial mobile service as defined in § 23-17-403.

History. Acts 1997, No. 1310, § 2.

5-36-303. Theft of wireless service.

(a) A person commits the offense of theft of wireless service if he or she intentionally obtains wireless service by the use of an unlawful wireless device or without the consent of the wireless service provider.

(b) Theft of wireless service is a:

(1) Class A misdemeanor if the aggregate value of service obtained is five hundred dollars (\$500) or less;

(2) Class C felony if the:

(A) Aggregate value of service obtained is more than five hundred dollars (\$500) but less than two thousand five hundred dollars (\$2500); or

(B) Stolen service is used to communicate a threat of damage or injury by bombing, fire, or other means, in a manner likely to:

(i) Place another person in reasonable apprehension of physical injury to himself or herself or another person or of damage to his or her property or to the property of another person; or

(ii) Create a public alarm; or

(3) Class B felony if the:

(A) Aggregate value of service is two thousand five hundred dollars (\$2500) or more;

(B) Conviction is for a second or subsequent offense; or

(C) Person convicted of the offense has been previously convicted of any similar crime in this or any other state or federal jurisdiction.

History. Acts 1997, No. 1310, § 3; added present (b)(2)(B); and made stylistic changes
2003, No. 1087, § 25.

Amendments. The 2003 amendment

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Theft of Wireless Service, 26 UALR L.J. 364. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

5-36-304. Facilitating theft of wireless service by manufacture, distribution, or possession of devices for theft of wireless services.

(a) A person commits the offense of facilitating theft of wireless service if he or she:

(1) Makes, distributes, possesses, uses, assembles, modifies, alters, programs, or reprograms a wireless device for the purpose of:

(i) Commission of a theft of wireless service or to acquire or facilitate the acquisition of wireless service without the consent of the wireless service provider; or

(ii) Concealing or assisting another person to conceal from any wireless service provider or from any lawful authority the existence or place of origin or of destination of any wireless communication; or

(2) Sells, possesses, distributes, gives, or otherwise transfers to another or offers, promotes, or advertises for sale any wireless device or any plans or instructions for making or assembling a wireless device, under circumstances evidencing an intent to use or employ the wireless device, or to allow it to be used or employed, for a purpose described in subdivision (a)(1) of this section or knowing or having reason to believe that the wireless device is intended to be so used, or that the plans or instructions are intended to be used for making or assembling a wireless device intended to be used in violation of this subchapter.

(b) Facilitating theft of wireless service is a:

(1) Class A misdemeanor if the aggregate value of service obtained is five hundred dollars (\$500) or less;

(2) Class C felony if the aggregate value of service obtained is more than five hundred dollars (\$500) but less than twenty-five hundred dollars (\$2500); or

(3) Class B felony if the:

(A) Aggregate value of service is twenty-five hundred dollars (\$2500) or more;

(B) Conviction is for a second or subsequent offense; or

(C) Person convicted of the offense has been previously convicted of any similar crime in this or any other state or federal jurisdiction.

History. Acts 1997, No. 1310, § 4.

5-36-305. Restitution.

In addition to any other sentence authorized by law, the court may sentence a person convicted of violating this subchapter to make restitution in the manner prescribed in § 5-4-205.

History. Acts 1997, No. 1310, § 5.

5-36-306. Civil remedy.

In a civil action in any court of competent jurisdiction, a wireless service provider aggrieved by a violation of this subchapter may obtain appropriate relief, including:

- (1) Preliminary and other equitable or declaratory relief;
- (2) Compensatory and punitive damages;
- (3) Reasonable investigation expenses;
- (4) Costs of suit; and
- (5) Attorney fees.

History. Acts 1997, No. 1310, § 6.

5-36-307. Scanners not prohibited.

The provisions of this subchapter shall not be construed to prohibit the possession or use of a police scanner or an emergency scanner available to the general public.

History. Acts 1997, No. 1310, § 7.

SUBCHAPTER 4 — OFFENSES INVOLVING THEFT DETECTION DEVICES**SECTION.**

5-36-401. Unlawful use of a theft detection shielding device.

5-36-402. Unlawful possession of a theft detection shielding device.

5-36-403. Unlawful possession of a theft detection device remover.

SECTION.

5-36-404. Unlawful removal of a theft detection device.

5-36-405. Detention upon activation of antishoplifting or inventory control device.

A.C.R.C. Notes. References to “this chapter” in subchapter 1 may not apply to this subchapter which was enacted subsequently.

Cross References. Consolidation of of-

fenses — Shoplifting presumption — Amount of theft, § 5-36-102

Detention of shoplifting suspects, § 5-36-116.

5-36-401. Unlawful use of a theft detection shielding device.

(a) A person commits the offense of unlawful use of a theft detection shielding device if the person knowingly manufactures, sells, offers for sale, or distributes in any way a laminated or coated bag or device

peculiar to and marketed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor.

(b)(1) The unlawful use of a theft detection shielding device is a Class A misdemeanor.

(2) A subsequent violation of this section is a Class D felony.

History. Acts 2001, No. 1194, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-36-402. Unlawful possession of a theft detection shielding device.

(a) A person commits the offense of unlawful possession of a theft detection shielding device if the person knowingly possesses any laminated or coated bag or device peculiar to and designed for shielding and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor with the intent to commit theft or retail theft.

(b)(1) The unlawful possession of a theft detection shielding device is a Class A misdemeanor.

(2) A subsequent violation of this section is a Class D felony.

History. Acts 2001, No. 1194, § 2.

5-36-403. Unlawful possession of a theft detection device remover.

(a) A person commits the offense of unlawful possession of a theft detection device remover if the person knowingly possesses any tool or device designed to allow the removal of any theft detection device from any merchandise with the intent to use the tool to remove any theft detection device from any merchandise without the permission of the merchant or person owning or holding the merchandise.

(b)(1) The unlawful possession of a theft detection device remover is a Class A misdemeanor.

(2) A subsequent violation of this section is a Class D felony.

History. Acts 2001, No. 1194, § 3.

5-36-404. Unlawful removal of a theft detection device.

(a) A person commits the offense of unlawful removal of a theft detection device if the person knowingly removes a theft detection device from merchandise prior to purchase with the intent to commit theft or retail theft.

(b)(1) The unlawful removal of a theft detection device is a Class A misdemeanor.

(2) A subsequent violation of this section is a Class D felony.

History. Acts 2001, No. 1194, § 4.

5-36-405. Detention upon activation of antishoplifting or inventory control device.

(a) If sufficient notice has been posted to advise patrons that an antishoplifting or inventory control device is being utilized, the activation of an antishoplifting or inventory control device as a result of a person's exiting an establishment or a protected area within the establishment is a reasonable cause for the detention of the person exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator.

(b) Any detention shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the antishoplifting or inventory control device or for the recovery of a good.

(c) The taking of a person into custody and detention by a law enforcement officer, merchant, or merchant's employee, in compliance with this section, does not render the law enforcement officer, merchant, or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

History. Acts 2001, No. 1194, § 5.

Cross References. Detention of shoplifting suspects, § 5-36-116.

CHAPTER 37

FORGERY AND FRAUDULENT PRACTICES

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. OFFENSES GENERALLY.
3. WORTHLESS CHECKS.
4. CABLE TELEVISION.
5. BUSINESS AND COMMERCIAL OFFENSES GENERALLY.

RESEARCH REFERENCES

Am. Jur. 36 Am. Jur. 2d, Forgery, § 1 et seq.

37 Am. Jur. 2d, Fraud, § 1 et seq.

C.J.S. 37 C.J.S., Forgery, § 1 et seq.

37 C.J.S., Fraud, § 1 et seq.

UALR L.J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

CASE NOTES

Cited: Hunter v. State, 278 Ark. 428,
645 S.W.2d 954 (1983).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-37-101. Definitions.

5-37-102. Access to information not in-
fringed.

5-37-101. Definitions.

As used in this chapter:

(1) "Coin machine" means a coin box, turnstile, vending machine, receptacle, or other mechanical or electronic device designed to receive a coin or bill of a certain denomination or token made for that purpose, and in return for the insertion or deposit of the coin, bill, or token, to offer, to provide, to assist in providing, or to permit the acquisition of property or public or private service;

(2) "Credit card" means any instrument or device issued with or without fee by an issuer for use in obtaining money, goods, services, or anything else of value on credit;

(3)(A) "Deception" means:

(i) Creating or reinforcing a false impression, including a false impression of fact, law, value, or intention or other state of mind that the actor does not believe to be true;

(ii) Preventing another person from acquiring information that would affect his or her judgment of a transaction;

(iii) Failing to correct a false impression that the actor knows to be false and that the actor created or reinforced or that the actor knows to be influencing another person to whom the actor stands in a fiduciary or confidential relationship; or

(iv) Failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property that the actor transfers or encumbers in consideration for the property or service obtained or in order to continue to deprive another person of that other person's property, whether the impediment is or is not valid or is or is not a matter of official record; or

(v) Employing any other scheme to defraud.

(B) As to a person's intention to perform a promise, "deception" shall not be inferred solely from the fact that the person did not subsequently perform the promise.

(C) "Deception" does not include:

(i) Falsity as to a matter having no pecuniary significance; or

(ii) Puffing by a statement unlikely to deceive an ordinary person in the group addressed;

(4) "Enterprise" means any entity of one (1) or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, charitable, social, political, or governmental activity;

(5) "Financial institution" means any organization or enterprise held out to the public as a place of deposit of funds or medium of savings;

(6)(A) "Slug" means an object that by virtue of its size, shape, or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as a substitute for a genuine coin, bill, or token.

(B) The value of a slug is deemed to be the value of the coin, bill, or token for which it is capable of being substituted;

(7) "Utter" means to transfer, pass, or deliver or cause to be transferred, passed, or delivered to another person any written instrument, or to attempt to do so;

(8)(A) "Value" means:

(i) The market value of the property or service at the time and place of the offense;

(ii) If the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense; or

(iii) In the case of a written instrument, other than a written instrument having a readily ascertainable market value:

(a) The amount due and collectible at maturity less any part that has been satisfied if the written instrument constitutes evidence of a debt; or

(b) The greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the written instrument if the written instrument is other than evidence of a debt.

(B) If the actor gave consideration for or had a legal interest in the property or service, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service to determine value; and

(9)(A) "Written instrument" means any paper, document, or other material containing written or printed matter or its equivalent.

(B) "Written instrument" includes any money, token, stamp, seal, badge, trademark, retail sales receipt, universal product code label or other evidence or symbol of value, right, privilege, or identification that is capable of being used to the advantage or disadvantage of any person.

History. Acts 1975, No. 280, § 2301;
A.S.A. 1947, § 41-2301; Acts 1999, No.
1479, § 1.

CASE NOTES

Written Instrument.

The language, "and shall include any money, token, stamp, seal, badge, trademark or other evidence or symbol of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of any person" does not purport to be an exclusive enumeration of

written instruments or to limit the definition of "written instrument" as "any paper, document or other material containing written or printed matter or its equivalent." *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Cited: *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

5-37-102. Access to information not infringed.

Nothing in § 5-37-227 or § 5-37-510 shall be construed to conflict with the Freedom of Information Act of 1967, § 25-19-101 et seq.

History. Acts 1999, No. 1578, § 3.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-37-201. Forgery.
- 5-37-202. Falsifying a business record.
- 5-37-203. Defrauding a secured creditor.
- 5-37-204. Fraud in insolvency.
- 5-37-205. Issuing a false financial statement.
- 5-37-206. Receiving a deposit in a failing financial institution.
- 5-37-207. Fraudulent use of a credit card or debit card.
- 5-37-208. Criminal impersonation.
- 5-37-209. Criminal possession of a forgery device.
- 5-37-210. Obtaining a signature by deception.

SECTION.

- 5-37-211. Defrauding a judgment creditor.
- 5-37-212. Unlawfully using a slug.
- 5-37-213. Criminal simulation.
- 5-37-214. Fraud — Aggregation of amounts.
- 5-37-215 — 5-37-224. [Reserved.]
- 5-37-225. Use of false transcript, diploma, or grade report from postsecondary educational institution.
- 5-37-226. Filing instruments affecting title or interest in real property.
- 5-37-227. Financial identity fraud.
- 5-37-228. Identity theft passport.

Cross References. Fines, § 5-4-201.
False evidences of title or registration,
§ 27-14-307.

Term of imprisonment, § 5-4-401.

RESEARCH REFERENCES

ALR. Rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act. 19 ALR 4th 959.

5-37-201. Forgery.

(a) A person forges a written instrument if, with purpose to defraud, makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.

(b) A person commits forgery in the first degree if he or she forges a written instrument that is:

(1) Money, a security, a postage or revenue stamp, or other instrument issued by a government; or

(2) A stock, bond, or similar instrument representing an interest in property or a claim against a corporation or its property.

(c) A person commits forgery in the second degree if he or she forges a written instrument that is:

(1) A deed, will, codicil, contract, assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status;

(2) A public record, or an instrument filed or required by law to be filed, or an instrument legally entitled to be filed in a public office or with a public servant; or

(3) A written instrument officially issued or created by a public office, public servant, or government agent.

(d) Forgery in the first degree is a Class B felony.

(e) Forgery in the second degree is a Class C felony.

History. Acts 1975, No. 280, § 2302; A.S.A. 1947, § 41-2302.

RESEARCH REFERENCES

ALR. Evidence of intent to defraud in state forgery prosecution. 108 ALR 5th 593.

CASE NOTES

ANALYSIS

Purpose.

Applicability.

Acts constituting forgery.

Consolidation of offenses.

Defense.

Evidence.

Indictment or information.

Injured party.

Instructions.

Knowledge and intent.

Lesser included offense.

Possession.

Sentence.

Signature or endorsement.

Uttering.

Purpose.

It was the intention of the drafters to broaden the scope of the crime of forgery. *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Applicability.

A check need not be negotiable in order to come within the purview of this section. *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Acts Constituting Forgery.

The term forgery had a fixed legal meaning; it was the fraudulent making or alteration of any writing to the prejudice of another man's rights. *Van Horne v. State*, 5 Ark. (5 Pike) 349 (1843); *Lemay v. Williams*, 32 Ark. 166 (1877) (preceding decisions under prior law).

Particular actions held to be forgery. *Claiborne v. State*, 51 Ark. 88, 9 S.W. 851 (1888); *White v. State*, 83 Ark. 36, 102 S.W. 715 (1907); *Holloway v. State*, 90 Ark. 123, 118 S.W. 256 (1909); *Maloney v. State*, 91 Ark. 485, 121 S.W. 728 (1909); *Quertermous v. State*, 114 Ark. 452, 170 S.W. 225 (1914); *Brashears v. State*, 203

Ark. 1014, 160 S.W.2d 505 (1942) (preceding decisions under prior law).

Particular actions held not to be forgery. *Bingan v. State*, 180 Ark. 266, 21 S.W.2d 156 (1929) (decision under prior law).

Where defendant presented to a motel a check issued by a state government payable to his stepfather, an appellate court rejected his claim that he did not commit forgery because he had not "forged" anything, even though defendant conceded that he stole the check with the purpose to defraud; by purporting that he had the authority to cash the check, defendant "uttered" the check and was thus properly convicted of first-degree forgery. *Ruffin v. State*, 83 Ark. App. 44, 115 S.W.3d 814 (2003).

Consolidation of Offenses.

When the state charged defendant with forgery, the charge was broad enough to cover the crimes previously known as forgery, uttering and possession of a forged instrument. *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Any of the acts set forth in subsection (a) constitutes the single crime of forgery. *Robinson v. State*, 10 Ark. App. 441, 664 S.W.2d 905 (1984).

Defense.

It was no defense for a creditor to show that when he executed a forgery on his debtor, he intended to apply the money thus obtained to the payment of his debt. *Claiborne v. State*, 51 Ark. 88, 9 S.W. 851 (1888) (decision under prior law).

A belief that one whose name was forged to a check would pay it in order to protect defendant was no defense. *Rose v. State*, 80 Ark. 222, 96 S.W. 996 (1906) (decision under prior law).

In establishing his defense of intoxication to a charge of forgery, a crime which requires a "purposeful" mental state, the defendant was required to prove by a preponderance of the evidence that he could not have entertained or formed the necessary intent or purposeful mental state to commit forgery; he simply failed to sustain that burden, and the trial judge so found. *Gonce v. State*, 11 Ark. App. 278, 669 S.W.2d 490 (1984).

While the trial judge's reference in a forgery prosecution to the defendant's intoxication as a "mitigating" circumstance

was erroneous, it was insufficient to reverse the defendant's conviction in view of the clear factual findings made by the judge. *Gonce v. State*, 11 Ark. App. 278, 669 S.W.2d 490 (1984).

Evidence.

Evidence held insufficient to support conviction. *Holloway v. State*, 90 Ark. 123, 118 S.W. 256 (1909) (decision under prior law).

Evidence held sufficient to support conviction. *Tongs v. State*, 130 Ark. 344, 197 S.W. 573 (1917); *Keese v. State*, 223 Ark. 261, 265 S.W.2d 542 (1954); *Edens v. State*, 235 Ark. 178, 359 S.W.2d 432 (1962), cert. denied, 371 U.S. 968, 83 S. Ct. 551, 9 L. Ed. 2d 538 (1963) (preceding decisions under prior law) *Muhammed v. State*, 300 Ark. 112, 776 S.W.2d 825 (1989); *Coley v. State*, 304 Ark. 304, 801 S.W.2d 647 (1991); *Washington v. State*, 31 Ark. App. 62, 787 S.W.2d 254 (1990).

Appellant juvenile was properly adjudicated a delinquent for check forgery where evidence showed she took a checkbook out her classmate's purse and forged checks at a department store; at trial, a store employee testified that he took one of the forged check's from appellant and recognized her from her yearbook picture. *Taylor v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 770 (Nov. 3, 2004).

Indictment or Information.

For cases discussing the sufficiency of an indictment or information, see *Gabe v. State*, 6 Ark. (1 English) 519 (1845); *Smith Bell v. State*, 10 Ark. (5 English) 536 (1850); *Quertermous v. State*, 95 Ark. 48, 127 S.W. 951 (1910); *Zachary v. State*, 97 Ark. 176, 133 S.W. 811 (1911); *Godard v. State*, 100 Ark. 149, 139 S.W. 1131 (1911); *Ary v. State*, 104 Ark. 212, 148 S.W. 1032 (1912); *Williams v. State*, 131 Ark. 264, 198 S.W. 699 (1917) (preceding decisions under prior law).

In indictment, it was necessary to aver that the defendant had the fictitious note in his possession with intent to utter or pass it as and for a genuine bill, for the intent to impose the instrument on the community as good money constituted the essence of the offense. *Gabe v. State*, 6 Ark. (1 English) 519 (1845) (decision under prior law).

An indictment for forging a school district warrant need not allege that the

school district was a corporation. *Ball v. State*, 48 Ark. 94, 2 S.W. 462 (1886) (decision under prior law).

Where indictment described forged instrument as having certain figures on its face, it was necessary that such figures were on the instrument when it left the hands of defendant although it would have been unnecessary to describe the instrument by such figures in the indictment. *McDonnell v. State*, 58 Ark. 242, 24 S.W. 105 (1893) (decision under prior law).

An indictment for forging a deed of land with an intent to defraud the owner of the land need not show upon its face in what manner the owner was to be defrauded, that being a matter of proof upon the trial. *Snow v. State*, 85 Ark. 203, 107 S.W. 980 (1908) (decision under prior law).

Use of one word in setting out instrument in indictment, while bond introduced in evidence used another similar word held to be a clerical error and not a material variance. *Holloway v. State*, 90 Ark. 123, 118 S.W. 256 (1909) (decision under prior law).

An indictment for forgery of a certain writing which alleged that the writing was of the tenor and effect as followed, and set out the writing in detail was held to set out the writing according to its tenor. *Evans v. State*, 94 Ark. 400, 127 S.W. 743 (1910); *Bennett v. State*, 96 Ark. 101, 131 S.W. 213 (1910) (preceding decisions under prior law).

Where an indictment charged the appellant with uttering a forged check drawn on one bank while the instrument set out in the indictment as shown by the proof was drawn on another bank; it was held that there was no variance as the instrument as set out in the indictment controlled and the inconsistent statement in the indictment was treated as surplusage. *Rawlings v. State*, 117 Ark. 539, 174 S.W. 150 (1915) (decision under prior law).

Where the defendant was indicted for the forgery of a check but not for the forgery of an indorsement thereon, the indorsement on the check did not constitute in law a part of it and need not be set out in an indictment for forgery of the check. *Finn v. State*, 127 Ark. 204, 191 S.W. 899 (1917); *McCoy v. State*, 161 Ark. 658, 257 S.W. 386 (1924) (preceding decisions under prior law).

When an indictment for forgery alleged that the check was forged and counter-

feited, it in effect alleged that it was made without the authority of the person whose name was signed thereto. *Finn v. State*, 127 Ark. 204, 191 S.W. 899 (1917) (decision under prior law).

Injured Party.

The forgery of a stay bond had the effect of injuring the judgment-creditor in his estate and in the enforcement of his lawful rights. *Holloway v. State*, 90 Ark. 123, 118 S.W. 256 (1909) (decision under prior law).

Where the defendant was charged with forgery of a check signed by the depositor with intent to defraud the depositor, proof that the depositor had previously overdrawn his account at the bank did not establish that the bank and not the depositor was the person intended to be defrauded. *Pennell v. State*, 170 Ark. 1119, 282 S.W. 992 (1926) (decision under prior law).

Instructions.

In a prosecution for forgery, the trial court did not err by refusing to instruct the jury on the lesser included offense of criminal attempt to commit forgery; the crime of forgery was complete upon the defendant's being in possession of the forged instrument, or upon his attempt to pass the check, or upon his passing of the check, and the defendant was either guilty of forgery or nothing. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986).

Knowledge and Intent.

To constitute the offense of uttering and publishing a forged writing, there had to be an intent to defraud and a knowledge of its falsity. *Elsev v. State*, 47 Ark. 572, 2 S.W. 337 (1886) (decision under prior law).

In order to constitute the offense of uttering and publishing a forged writing it was necessary that there was an intent to defraud and that there was a knowledge of the falsity of the instrument on the part of the defendant. *Ferrell v. State*, 165 Ark. 541, 265 S.W. 62 (1924) (decision under prior law).

An allegation which in effect alleged that the defendant unlawfully and feloniously uttered a note, knowing it to be forged with the intent feloniously to obtain possession of another's property necessarily imported that the note was uttered with a fraudulent intent. *Teague v.*

State, 86 Ark. 126, 110 S.W. 224 (1908) (decision under prior law).

One who, with intent to defraud, passed a check known to him to have been forged was guilty of forgery. *Moulton v. State*, 105 Ark. 502, 152 S.W. 132 (1912) (decision under prior law).

Fraudulent intent was an essential ingredient in the crime of uttering a forged instrument. *Rickman v. State*, 135 Ark. 298, 205 S.W. 711 (1918) (decision under prior law).

It was not error to admit other checks of similar nature to those charged in indictment since they were admissible to prove criminal intent, design, or part of a common plan on the part of the defendants to defraud. *Keese v. State*, 223 Ark. 261, 265 S.W.2d 542 (1954) (decision under prior law).

Lesser Included Offense.

Court held to have properly refused to give instruction on the lesser offense of criminal simulation. *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979).

Trial court erred in finding defendant guilty of second-degree forgery as it was not a lesser-included offense of first-degree forgery, set forth in the charging instrument and under which the trial proceeded; as provided in subsections (b) and (c) of this section, second-degree forgery requires proof of documents different from those for first-degree forgery and does not meet the requirements of the tests set out in § 5-1-110(b) for a lesser-included offense, therefore, they are two separate crimes. *Eagle v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 622 (Sept. 21, 2005).

Possession.

Simultaneous possession of several forged checks was a single offense and a defendant could not be prosecuted separately for each check. *Yarbrough v. State*, 257 Ark. 732, 520 S.W.2d 227 (1975) (decision under prior law).

Possession of a forged instrument by one who offers or seeks to utter it without any reasonable explanation of the manner in which he acquired it warrants an inference that the possessor committed the forgery or was a guilty accessory to its commission. *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Evidence held sufficient to support the

finding of the jury that the defendant was in possession of the contraband. *Lee v. State*, 270 Ark. 892, 609 S.W.2d 3 (1980).

Sentence.

Sentence for forgery in the second degree, a class C felony, did not constitute cruel and unusual punishment, since the sentence was within the limits imposed by statute. *Conti v. State*, 10 Ark. App. 352, 664 S.W.2d 502 (1984).

Signature or Endorsement.

An instrument may be forged by signing the name of a fictitious person. *Maloney v. State*, 91 Ark. 485, 121 S.W. 728 (1909) (decision under prior law); *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

Proof that the defendant indorsed another's name to a check payable to the latter representing himself to be the payee would not justify an inference that he did not have authority to sign the payee's name as indorser of the check. *Ferrell v. State*, 165 Ark. 541, 265 S.W. 62 (1924) (decision under prior law).

Convictions for forgery and theft of property must be overturned where State failed to prove that checks, which were passed by defendant in exchange for merchandise, were signed by defendant or that signatures which appeared thereon were unauthorized. *Askew v. State*, 280 Ark. 304, 657 S.W.2d 540 (1983).

Uttering.

Particular actions held to be uttering of a forged instrument. *Crain v. State*, 45 Ark. 450 (1885); *Claiborne v. State*, 51 Ark. 88, 9 S.W. 851 (1888); *Arnold v. State*, 71 Ark. 367, 74 S.W. 513 (1903) (preceding decisions under prior law).

The delivery, or attempted delivery, of a paper, document or other material containing written or printed matter or its equivalent that purports to be or is calculated to become, or to represent if completed, the act of a person who did not authorize the act and that may evidence, create, transfer or otherwise affect a legal right, interest or status constitutes uttering under this section. *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978).

"Utter," as used in subsection (a) of this section, includes the delivery or attempted delivery of a written instrument. *Faulkner v. State*, 16 Ark. App. 128, 697 S.W.2d 537 (1985).

Cited: David v. State, 286 Ark. 205, 691 S.W.2d 133 (1985); Walker v. Lockhart, 807 F.2d 136 (8th Cir. 1986).

5-37-202. Falsifying a business record.

(a) A person commits the offense of falsifying a business record if, with purpose to defraud or injure, the person:

(1) Makes or causes a false entry to be made in a business record of an enterprise;

(2) Alters, erases, obliterates, deletes, removes, or destroys a true entry in a business record of an enterprise;

(3) Omits to make a true entry in a business record of an enterprise in violation of a duty to do so that the person knows to be imposed upon him or her by law or by the nature of his or her position; or

(4) Prevents the making of a true entry or causes the omission of a true entry in a business record of an enterprise.

(b) Falsifying a business record is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2303; A.S.A. 1947, § 41-2303.

CASE NOTES

ANALYSIS

Evidence.

Information.

Intent.

Evidence.

Defendant's conviction was reversed where in order to convict, state was required to present proof that false entries were made in the business records of the company and were made with the intent to defraud or injure, and state failed to introduce any business records that defendant was accused of falsifying. *Williams v. State*, 302 Ark. 234, 788 S.W.2d 241 (1990).

Information.

The language of the information, charging defendant under subdivision (a)(1), limited the state to proof of those specific elements set forth in the information. To attempt to prove any of the three other elements of the section would constitute a fatal variance between the information and the proof. *Williams v. State*, 302 Ark. 234, 788 S.W.2d 241 (1990).

Intent.

An instruction which omitted the element of intent to defraud on a charge of making false entries in the books of a bank was erroneous. *Mears v. State*, 84 Ark. 136, 104 S.W. 1095 (1907) (decision under prior law).

5-37-203. Defrauding a secured creditor.

(a) A person commits the offense of defrauding a secured creditor if he or she destroys, removes, cancels, encumbers, transfers, or otherwise disposes of property subject to a security interest with the purpose to hinder enforcement of the security interest.

(b) Defrauding a secured creditor is a Class D felony.

History. Acts 1975, No. 280, § 2304; A.S.A. 1947, § 41-2304.

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

Nickles, A Localized Treatise on Secured Transactions — Part II: Creating Security Interests, 34 Ark. L. Rev. 559.

CASE NOTES

ANALYSIS

Applicability.
Bankruptcy proceedings.
Consent of lienholder.
Debt.
Defenses of debtor in bankruptcy.
Demand.
Disposal.
Evidence.
False pretenses.
Indictment.
Intent.
Purpose to hinder.
Security interest.
Subsequent satisfaction.

Applicability.

Defendant who sold property mortgaged to federal government agency could be prosecuted under former section prohibiting the removal of property subject to lien, since state and federal courts had concurrent jurisdiction. *State v. Duncan*, 221 Ark. 681, 255 S.W.2d 430 (1953) (decision under prior law).

Bankruptcy Proceedings.

Where defendant/debtor misappropriated the sale proceeds in which he had no legal or equitable interest, the debtor acted with malice in harming the creditor's property just as if he were a bank robber or an embezzler, and the fact that the debtor's conduct rose to the level of two separate criminal offenses under state law supported the conclusion that the debtor's act was malicious and the debt was not dischargeable in bankruptcy. *Mercantile Bank of Ark., N.A. v. Speers*, 244 Bankr. 142 (Bankr. E.D. Ark. 2000).

Consent of Lienholder.

Instruction that if the defendant removed the secured property from the state without the legal authority or consent of the prosecuting witness the jury should convict him was erroneous in using the word "legal," being calculated to mislead the jury. *Murry v. State*, 150 Ark. 461, 234 S.W. 485 (1921) (decision under prior law).

Defendant was entitled to instruction that if evidence indicated that the secured party consented to the sale of the secured property, defendant would be acquitted, and that consent could have been expressed or implied from the conduct of the parties. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972) (decision under prior law).

Requested instruction to the effect that if the secured party later acquiesced in the sale of the secured property defendant should be acquitted, was properly refused, since consent, if set up as a defense in a criminal case, had to precede the act constituting the gist of the offense and did not relate to what occurred thereafter, although the secured party's conduct subsequent to the sale was considered as evidence of prior consent. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972) (decision under prior law).

Debt.

Existence of debt secured by lien had to be shown. *McCaskill v. State*, 68 Ark. 490, 60 S.W. 234 (1900) (decision under prior law).

Defenses of Debtor in Bankruptcy.

The debtor failed to establish that the prosecution was pursued in bad faith or for the primary purpose of collecting a dischargeable debt from the debtor individually, where the allegations against the debtor for which criminal sanctions were sought was the debtor's alleged fraud of selling mortgaged property without permission, not his failure to pay the debt owed to the bank. *Evans v. Bank of Eureka Springs*, 245 Bankr. 852 (Bankr. W.D. Ark. 2000).

Demand.

Where a defendant was charged with disposing of mortgaged chattels, it was not necessary as a condition for conviction that a demand be made on the mortgagor for the debt or the mortgaged property nor

that the defendant refuse, upon demand, to pay the debt. *Stewart v. State*, 139 Ark. 403, 214 S.W. 48 (1919); *McClaskey v. State*, 168 Ark. 339, 270 S.W. 498 (1925) (preceding decisions under prior law).

Disposal.

Concealment of secured goods so that it could not be found for the purpose of foreclosing the mortgage constituted a disposition of secured goods. *McClaskey v. State*, 168 Ark. 339, 270 S.W. 498 (1925) (decision under prior law).

Evidence.

Evidence held insufficient to support conviction. *Houston v. State*, 66 Ark. 120, 49 S.W. 351 (1899) (decision under prior law).

Evidence held sufficient to support conviction. *Early v. State*, 226 Ark. 376, 290 S.W.2d 13 (1956) (decision under prior law).

False Pretenses.

The offense of obtaining personal property under false pretenses was distinguished from the offense of fraudulently conveying property in that the former offense consisted of obtaining money or property by false representations of an existing or past fact whether relating to land or anything else by one who knew the representation to be false while the latter offense could exist under a conveyance to defraud whether there were false representations or not. *Shelton v. State*, 96 Ark. 237, 131 S.W. 871 (1910) (decision under prior law).

Indictment.

The indictment for removing property subject to lien did not have to allege the manner of disposal; nor the vendee's name. *State v. Crawford*, 64 Ark. 194, 41 S.W. 425 (1897) (decision under prior law).

The indictment did not have to allege that the mortgage was of record. *Bennett v. State*, 65 Ark. 80, 44 S.W. 1037 (1898) (decision under prior law).

An indictment for removing mortgaged property from the county wherein the mortgage was recorded was not demurable as failing to allege an offense within the local jurisdiction of the court. *Hampton v. State*, 67 Ark. 266, 54 S.W. 746 (1899) (decision under prior law).

Indictment was required to allege the value of the property. *Kightlinger v. State*,

105 Ark. 172, 150 S.W. 690 (1912) (decision under prior law).

An indictment for disposing of mortgaged property was not required to allege the name of the person to whom the property was sold or that the purchaser was unknown. *McClaskey v. State*, 168 Ark. 339, 270 S.W. 498 (1925) (decision under prior law).

Intent.

A criminal intent was essential to sustain a conviction for removing property subject to lien. *Lawhorn v. State*, 108 Ark. 474, 158 S.W. 113 (1913) (decision under prior law).

In prosecution for removing mortgaged property from the state with intent to cheat and defraud mortgage holder, admission of evidence of extradition proceedings for such offense was not prejudicial as such evidence bore on the good faith and intention of defendant. *Early v. State*, 226 Ark. 376, 290 S.W.2d 13 (1956) (decision under prior law).

Where defendant could not be located and he allowed the insurance to lapse on his car, these circumstances alone do not establish defendant's intent to hinder the enforcement of a security interest; the state failed to prove that he acted with the requisite culpable mental state, and therefore his conviction cannot stand. *Eggleston v. State*, 16 Ark. App. 72, 697 S.W.2d 121 (1985).

Purpose to Hinder.

The fact that the defendant "removed" a truck to a new location was insufficient to establish a purpose to hinder enforcement of the lien of a secured creditor since the very nature and purpose of a truck is to be moved about, and since the defendant did not dispose of or destroy the truck. *Anderson v. State*, 62 Ark. App. 1, 967 S.W.2d 569 (1998).

Security Interest.

Lien could exist although mortgage was not recorded. *Hampton v. State*, 67 Ark. 266, 54 S.W. 746 (1899) (decision under prior law).

Where bank had erroneously sent automobile title to defendant who had not satisfied the indebtedness under a financing agreement, and where defendant transferred the certificate of title before bank discovered the mistake, bank held no lien at the time defendant transferred

title and thus defendant could not be convicted of disposing of mortgaged property with intent to defraud lienholder. *Austin v. State*, 259 Ark. 802, 536 S.W.2d 699 (1976) (decision under prior law).

Where the debtor was aware of the bank's security interest at the time he undertook to sell the bank's collateral, debtor's actions constituted both the tort of conversion and the state law statutory offenses of theft and defrauding secured creditors, and therefore he acted with malice in harming the bank's property when he misappropriated the sale proceeds in which he had no legal or equita-

ble interest. *Mercantile Bank of Ark., N.A. v. Speers*, 244 Bankr. 142 (Bankr. E.D. Ark. 2000).

Subsequent Satisfaction.

After the offense of removing mortgaged property had been committed, it could not be condoned by satisfying the creditor with other property. *Cooper v. State*, 37 Ark. 412 (1881) (decision under prior law).

Cited: *Crockett Motor Sales, Inc. v. London*, 283 Ark. 106, 671 S.W.2d 187 (1984); *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985).

5-37-204. Fraud in insolvency.

(a) A person commits fraud in insolvency if, with purpose to defraud, and with knowledge that a proceeding has been or is about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of a creditor, or that any other composition or liquidation for the benefit of a creditor has been or is about to be made, the person:

(1) Destroys, removes, conceals, encumbers, transfers, acquires, or otherwise deals with any property with purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of a creditor;

(2) Falsifies any writing or record relating to the property; or

(3) Misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of a creditor, the existence, amount, or location of the property, or any other information that the actor could be legally required to furnish to the receiver or other person entitled to administer property for the benefit of a creditor.

(b) Fraud in insolvency is a Class D felony.

History. Acts 1975, No. 280, § 2305; A.S.A. 1947, § 41-2305.

CASE NOTES

Sentence.

A person convicted of a crime has a right to have his sentence read and its conse-

quences made known to him at the time of pronouncement. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

5-37-205. Issuing a false financial statement.

(a) A person commits the offense of issuing a false financial statement if, with purpose to defraud or injure, the person:

(1) Makes or delivers a written instrument that describes his or her or another person's financial condition or ability to pay, knowing the written instrument is inaccurate in some material respect; or

(2) Represents in writing that a written instrument that describes a person's financial condition or ability to pay is accurate with respect to that person's financial condition or ability to pay, knowing the written instrument is inaccurate in some material respect.

(b) Issuing a false financial statement is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2306;
A.S.A. 1947, § 41-2306.

5-37-206. Receiving a deposit in a failing financial institution.

(a) A person commits the offense of receiving a deposit in a failing financial institution if, as an officer, manager, or other person participating in the direction of a financial institution, the person knowingly receives or permits the receipt of a deposit or other investment, knowing that the financial institution is insolvent, without disclosing the true financial condition of the financial institution.

(b) Receiving a deposit in a failing financial institution is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2307;
A.S.A. 1947, § 41-2307.

CASE NOTES

Cited: Robertson v. White, 633 F. Supp.
954 (W.D. Ark. 1986).

5-37-207. Fraudulent use of a credit card or debit card.

(a) A person commits the offense of fraudulent use of a credit card or debit card, if with purpose to defraud, he or she uses a credit card, credit card account number, debit card, or debit card account number to obtain property or a service with knowledge that:

(1) The credit card, credit card account number, debit card, or debit card account number is stolen;

(2) The credit card, credit card account number, debit card, or debit card account number has been revoked or cancelled;

(3) The credit card, credit card account number, debit card, or debit card account number is forged; or

(4) For any other reason his or her use of the credit card, credit card account number, debit card, or debit card account number is unauthorized by either the issuer or the person to whom the credit card or debit card is issued.

(b) Fraudulent use of a credit card or debit card is a:

(1) Class C felony if the value of all moneys, goods, or services obtained during any six-month period exceeds one hundred dollars (\$100); or

(2) Class A misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2308; A.S.A. 1947, § 41-2308; Acts 1997, No. 516, § 4; 2001, No. 1142, § 1.

Amendments. The 2001 amendment inserted “or debit card” following “a credit card” in (a), (a)(4), and (b)(1); inserted

“debit card, or debit card account number” preceding “to obtain property” in (a); redesignated former (b) as present (b)(1)-(2); and made gender neutral changes throughout.

CASE NOTES

ANALYSIS

Elements of offense.
Obtaining property.

Elements of Offense.

In general, under this section, it is the use of a stolen, revoked or cancelled, forged, or unauthorized credit card that results in a criminal violation; specifically, it is the use of the account numbers. *Patterson v. State*, 326 Ark. 1004, 935 S.W.2d 266 (1996).

Obtaining Property.

Obtaining property is required in order for there to be a consummated offense. *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991).

What militates against an interpretation that obtaining the property is not

required is the fact that the degree of the offense under the statute is based on the value of property obtained; it is a Class C felony if goods valuing more than \$100 are obtained; otherwise, it is a Class A misdemeanor. *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991).

Where defendant was charged for fraudulent use of a credit card but he never obtained property as required by the section, the case was remanded for judgment of conviction to be entered for the lesser included offense of attempted fraudulent use of credit cards. *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991).

Cited: *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

5-37-208. Criminal impersonation.

(a)(1) A person commits criminal impersonation in the first degree if, with the intent to induce a person to submit to pretended official authority for the purpose to injure or defraud the person, the person:

(A) Pretends to be a law enforcement officer by wearing or displaying, without authority, any uniform or badge by which a law enforcement officer is lawfully distinguished; or

(B) Uses a motor vehicle or motorcycle designed, equipped or marked so as to resemble a motor vehicle or motorcycle belonging to a federal, state, or local law enforcement agency.

(2) Criminal impersonation in the first degree is a Class D felony.

(b)(1) A person commits criminal impersonation in the second degree if the person does an act in his or her pretended or assumed capacity or character with the purpose to injure or defraud another person and the actor:

(A) Assumes a false identity;

(B) Pretends to be a representative of a person or organization;

(C) Pretends to be an officer or employee of the government other than a law enforcement officer described in subsection (a) of this section; or

(D) Pretends to have a handicap or disability.

(2) Criminal impersonation in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2310; A.S.A. 1947, § 41-2310; Acts 1991, No. 786, § 3; 1997, No. 1014, § 1.

Publisher's Notes. Acts 1991, No. 786, § 37, provided: "The enactment and adoption of this Act shall not repeal, expressly or impliedly, the acts passed at the regular session of the 78th General Assembly. All such acts shall have full effect and, so far

as those acts intentionally vary from or conflict with any provision contained in this Act, those acts shall have the effect of subsequent acts and as amending or repealing the appropriate parts of the Arkansas Code of 1987."

Cross References. Blue light or blue lens cap sales, § 5-77-201.

CASE NOTES

Evidence.

Evidence was sufficient to withstand a motion for a directed verdict where the evidence showed that the co-defendant represented himself and the defendant to be FBI agents and that the defendant not

only did not correct this misrepresentation but responded when addressed by his alias and, further, that two special officer police-type badges were recovered from their vehicle. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999).

5-37-209. Criminal possession of a forgery device.

(a) A person commits criminal possession of a forgery device if he or she makes or possesses any device, apparatus, equipment, or article capable of or adaptable to a use in forging a written instrument with the purpose to use it himself or herself, or to aid or permit another person to use it, to commit forgery.

(b) Criminal possession of a forgery device is a Class C felony.

History. Acts 1975, No. 280, § 2312; A.S.A. 1947, § 41-2312.

CASE NOTES

Evidence.

Evidence held sufficient to support the finding of the jury that the defendant was

in possession of a forgery device. *Lee v. State*, 270 Ark. 892, 609 S.W.2d 3 (1980).

5-37-210. Obtaining a signature by deception.

(a) A person commits the offense of obtaining a signature by deception if, with purpose to defraud, he or she obtains by deception the signing or execution of a written instrument affecting the pecuniary interest of any person.

(b) Obtaining a signature by deception is a Class D felony.

History. Acts 1975, No. 280, § 2313; A.S.A. 1947, § 41-2313.

5-37-211. Defrauding a judgment creditor.

(a) A person commits the offense of defrauding a judgment creditor if, with purpose to defraud and with knowledge that a civil proceeding has been or is about to be instituted, the person:

(1) Moves property to prevent its being levied upon by an execution;
or

(2) Conceals, assigns, conveys, or otherwise disposes of property to prevent that property from being made liable for the payment of a judgment.

(b) Defrauding a judgment creditor is a Class D felony.

History. Acts 1975, No. 280, § 2314;
A.S.A. 1947, § 41-2314.

CASE NOTES

Cited: Cotnam v. State, 36 Ark. App.
109, 819 S.W.2d 291 (1991).

5-37-212. Unlawfully using a slug.

(a) A person commits the offense of unlawfully using a slug if:

(1) With purpose to defraud, the person obtains property or a service sold or offered by means of a coin machine by inserting, depositing, or using a slug in that machine; or

(2) The person makes, possesses, or disposes of a slug with purpose to enable a person to use the slug fraudulently in a coin machine.

(b) Unlawfully using a slug is a:

(1) Class C felony if the value of the property or slug exceeds five hundred dollars (\$500); or

(2) Class A misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2309; inserted "or she" in (a)(1) and (a)(2); and
A.S.A. 1947, § 41-2309; Acts 2005, No. substituted "five hundred dollars (\$500)"
1994, § 464. for "one hundred dollars (\$100)" in (b).

Amendments. The 2005 amendment

5-37-213. Criminal simulation.

(a) A person commits criminal simulation if, with purpose to defraud or injure, the person:

(1) Makes, alters, or represents any object in such fashion that it appears to have an antiquity, rarity, source or authorship, ingredient, or composition that it does not in fact have; or

(2) Possesses or transfers an object simulated as described in subdivision (a)(1) of this section with knowledge of its true character.

(b) Criminal simulation is a:

(1) Class D felony if the value of the object simulated exceeds one hundred dollars (\$100); or

(2) Class A misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2311;
A.S.A. 1947, § 41-2311.

CASE NOTES

ANALYSIS

Evidence.
Instructions.
Lesser included offense.

Evidence.

Statements of filling station operator that she was purchasing white gasoline from defendant charged with aiding in the adulteration of liquid fuels and coloring it red to simulate higher grades was admissible. *Glover v. State*, 194 Ark. 66, 105 S.W.2d 82 (1937) (decision under prior law).

Instructions.

Instruction that if defendant participated in, or authorized, the delivery of his products into tanks branded with another distributor's name, he would be guilty and

if he did not knowingly participate in it, he would be not guilty, was proper and not a comment on the testimony, nor confusing or misleading. *Glover v. State*, 194 Ark. 66, 105 S.W.2d 82 (1937) (decision under prior law).

Lesser Included Offense.

Where the defendant was charged with forgery for uttering a check which was purported to have been drawn by another, who had not authorized the defendant's act, the court properly refused to give a jury instruction on the lesser offense of criminal simulation, because the defendant was either guilty of the greater charge of forgery or nothing at all. *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ct. App. 1979).

5-37-214. Fraud — Aggregation of amounts.

In a prosecution under § 5-37-212 or § 5-37-213, an amount involved in a fraud committed pursuant to one (1) scheme or course of conduct, whether committed against one (1) or more persons, may be aggregated in determining the grade of the offense.

History. Acts 1975, No. 280, § 2315; A.S.A. 1947, § 41-2315.

5-37-215 — 5-37-224. [Reserved.]**5-37-225. Use of false transcript, diploma, or grade report from postsecondary educational institution.**

(a) No person may falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting a transcript, diploma, or grade report of a postsecondary educational institution.

(b) No person may use, offer, or present as genuine a false, forged, counterfeited, or altered transcript, diploma, or grade report of a postsecondary educational institution.

(c) No person may use, offer, or present a transcript, diploma, or grade report of a postsecondary educational institution in a fraudulent manner.

(d) A person who violates any provision of this section is guilty of a Class A misdemeanor.

History. Acts 1991, No. 351, §§ 1, 2; 2005, No. 1994, § 345.

Amendments. The 2005 amendment,

in (d), inserted "Class A" preceding "misdemeanor" and deleted "and upon conviction shall be subject to a fine not to exceed

one thousand dollars (\$1,000), or imprisonment not to exceed six (6) months, or both" from the end.

5-37-226. Filing instruments affecting title or interest in real property.

(a) It is unlawful for any person to have placed of record in the office of the recorder of any county any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property with the knowledge of the instrument's lack of authenticity or genuineness; and

(2) With the intent of:

(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the recorder.

(b) Any person violating a provision of subsection (a) of this section is guilty of a Class A misdemeanor.

(c) Any owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct that is prohibited under subsection (a) of this section, and who must bring civil action to remove any cloud from his or her title or interest in the real property, or to clear his or her title or interest in the real property is entitled to three (3) times actual damages, punitive damages, and costs, including any reasonable attorney's fees or other costs of litigation reasonably incurred.

(d) The provisions of this section do not apply to a bona fide filing of lis pendens, materialmen's lien, laborer's lien, or other legitimate notice or protective filing as provided by law.

History. Acts 1995, No. 1086, §§ 1-3.

5-37-227. Financial identity fraud.

(a) A person commits financial identity fraud if, with the intent to:

(1) Create, obtain, or open a credit account, debit account, or other financial resource for his or her benefit or for the benefit of a third party, he or she accesses, obtains, records, or submits to a financial institution another person's identifying information for the purpose of opening or creating a credit account, debit account, or financial resource without the authorization of the person identified by the information; or

(2) Appropriate a financial resource of another person to his or her own use or to the use of a third party without the authorization of that the actor:

- (A) Uses a scanning device; or
- (B) Uses a re-encoder.
- (b) As used in this section:
 - (1) “Financial institution” includes, but is not limited to, a credit card company, bank, or any other type of lending or credit company or institution;
 - (2) “Financial resource” includes, but is not limited to, a credit card, debit card, or any other type of line of credit or loan;
 - (3) “Identifying information” includes, but is not limited to, a:
 - (A) Social security number;
 - (B) Driver’s license number;
 - (C) Checking account number;
 - (D) Savings account number;
 - (E) Credit card number;
 - (F) Debit card number;
 - (G) Personal identification number;
 - (H) Electronic identification number;
 - (I) Digital signature; or
 - (J) Any other number or information that can be used to access a person’s financial resources;
 - (4) “Re-encoder” means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card; and
 - (5) “Scanning device” means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.
- (c) The provisions of this section do not apply to any person who obtains another person’s driver’s license or other form of identification for the sole purpose of misrepresenting the actor’s age.
- (d) Financial identity fraud is a Class C felony.
- (e)(1) A violation of this section constitutes an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.
- (2) Any remedy, penalty, or authority granted to the Attorney General or another person under the Deceptive Trade Practices Act, § 4-88-101 et seq., is available to the Attorney General or that other person for the enforcement of this section.

History. Acts 1999, No. 568, § 1; 1999, No. 1578, § 1; 2005, No. 280, § 1; 2005, No. 1018, § 1.

A.C.R.C. Notes. Acts 1999, No. 1578, § 3, provides that: “Nothing in this Act shall be construed to conflict with the Freedom of Information Act.”

Amendments. The 2005 amendment

by No. 280 rewrote present (a)(1); added present (a)(3) and (a)(4) and made related changes; and substituted “Class C” for “Class D” in present (d).

The 2005 amendment by No. 1018 inserted present (a)(2) and made related changes; and added present (b)(4) and (b)(5).

RESEARCH REFERENCES

ALR. Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card. 106 ALR 5th 701.

Validity, construction, and application of state statutes relating to offense of identity theft.

CASE NOTES

Evidence.

Although the evidence was sufficient to convict defendant of financial identity fraud and theft of property because the search of defendant's purse, which contained the evidence necessary for those

convictions, by the first victim came at the sheriff's request, the first victim was an agent of the police and the warrantless search of defendant's purse violated the Fourth Amendment. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004).

5-37-228. Identity theft passport.

(a) The Attorney General in cooperation with any law enforcement agency may issue an identity theft passport to a person who:

(1) Is a resident of this state;

(2) Learns or reasonably suspects that he or she is a victim of financial identity fraud; and

(3) Has filed a police report citing that he or she is a victim of financial identity fraud as prohibited by § 5-37-227.

(b)(1) A person who learns or reasonably suspects that he or she is the victim of financial identity fraud may contact the local law enforcement agency that has jurisdiction over the city or county where the person resides.

(2) The local law enforcement agency:

(A) Shall make a police report of the matter whether or not the local law enforcement agency has jurisdiction to investigate and prosecute a crime of financial identity fraud against the victim;

(B) Shall provide the victim with a copy of the police report; and

(C) May refer the police report to a law enforcement agency with jurisdiction to investigate and prosecute a crime of financial identity fraud.

(3) Nothing in this section interferes with the discretion of a local law enforcement agency to allocate resources for an investigation of a crime.

(4) A police report filed by a victim of financial identity fraud under this section is not required to be counted as an open case for purposes such as compiling open case statistics.

(c)(1) After the victim has filed a police report with any local law enforcement agency, the victim may apply for an identity theft passport by sending to the office of the Attorney General:

(A) A copy of the police report;

(B) An application for an identity theft passport; and

(C) Any other supporting documentation requested by the Attorney General.

(2) The Attorney General shall process the application and supporting police report and may issue the victim of financial identity fraud an identity theft passport in the form of a card or certificate.

(d)(1) A victim of financial identity fraud may present the victim's identity theft passport issued under this section to:

(A) A law enforcement agency to help prevent the victim's arrest or detention for an offense committed by a person other than the victim, who is using the victim's identity;

(B) Any creditor of the victim to aid in the creditor's investigation and establishment of whether a fraudulent charge was made against an account in the victim's name or whether an account was opened using the victim's identity; or

(C) Any other entity to aid in the entity's investigation of whether the victim's identity was fraudulently obtained or used without the victim's consent.

(2)(A) Acceptance of the identity theft passport presented by the victim to a law enforcement agency, creditor, or other entity under subdivision (d)(1) of this section is at the discretion of the law enforcement agency, creditor, or other entity.

(B) A law enforcement agency, creditor, or other entity may consider the identity theft passport as well as surrounding circumstances and available information concerning the offense of financial identity fraud against the victim in determining whether to accept the identity theft passport.

(e)(1) An application for an identity theft passport under subsection (c) of this section and any supporting documentation are not public records.

(2) The Attorney General may provide access to an application under subsection (a) of this section and supporting documentation to another criminal justice or law enforcement agency in this state or another state.

History. Acts 2005, No. 744, § 1.

SUBCHAPTER 3 — WORTHLESS CHECKS

SECTION.

5-37-301. Title.

5-37-302. Unlawful acts.

5-37-303. Notice.

5-37-304. Evidence against maker or drawer.

SECTION.

5-37-305. Penalties.

5-37-306. Prosecutions.

5-37-307. Knowingly issuing worthless check.

Effective Dates. Acts 1977, No. 155, § 2: Feb. 14, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is not clear whether the present law relating to the writing and passing of a "hot" check

for the payment of taxes, licenses and fees is unlawful; that it is essential to the well-being of the State of Arkansas and the citizens of the State that the law be clarified immediately to render such act unlawful, and that this Act is designed to

accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 899, § 6: Mar. 28, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present hot check laws are vague and ambiguous and in need of immediate change and that this Act is immediately necessary to accomplish such change. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 473, § 4: Mar. 15, 1983. Emergency clause provided: "It is hereby determined by the General Assembly that the present hot check laws are vague and ambiguous and in need of immediate change and that this Act is necessary to correct present deficiencies. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and apply prospectively from the date of its passage and approval."

Acts 1985, No. 1012, § 3: Apr. 17, 1985. Emergency clause provided: "It has been found and is hereby determined that a problem with bad checks and other bad paper given in payment of fines levied and court costs assessed in the courts of Arkansas has become acute, has resulted in a frustration of justice in numerous instances, and caused a serious and unnecessary burden on the judges and administrative personnel of the Courts. Therefore, an emergency is declared to exist, and this

Act shall take effect and be in force from the date of its passage and approval."

Acts 1992 (1st Ex. Sess.), No. 44, § 6: Mar. 17, 1992. Emergency clause provided: "It has been found and it is hereby declared by the General Assembly of the State of Arkansas that some people have misinterpreted the law to the effect that merchants could not aggregate worthless-check notices in one letter and prosecutors could not collect service charges. This has created a burden, especially during recession times. This act is immediately necessary to avoid further misinterpretations. An emergency, therefore, is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2001, No. 996, § 5: Mar. 21, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the incidents of people writing "hot checks" continue to increase; that the costs associated with the processing of and collecting on "hot checks" have continued to increase; that the holders of those "hot checks" are entitled to recover those increasing costs; that current law does not allow adequate recovery of the costs associated with "hot checks" by their holders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

CASE NOTES

Applicability.

Debtor's motion for damages against a county, a city, and a prosecutor for willful violation of the automatic bankruptcy stay was denied because, under 11 U.S.C.S. § 362(b)(1), the stay did not apply to criminal proceedings, including the enforcement of orders to pay fines and restitution, and the debtor had admitted

that she had been convicted under the Arkansas Hot Check Law, §§ 5-37-301 — 5-37-306. *In re Bibbs*, 282 Bankr. 876 (Bankr. E.D. Ark. 2002).

Cited: *Tolbert v. State*, 244 Ark. 1067, 428 S.W.2d 264 (1968); *State v. Manees*, 264 Ark. 190, 569 S.W.2d 665 (1978); *Cecil v. State*, 283 Ark. 348, 676 S.W.2d 730 (1984).

5-37-301. Title.

For convenience, this section and §§ 5-37-302 — 5-37-306 may be referred to and cited as “The Arkansas Hot Check Law”.

History. Acts 1959, No. 241, § 1;
A.S.A. 1947, § 67-719.

5-37-302. Unlawful acts.

It is unlawful for any person:

(1) To procure any article or thing of value or to secure possession of any personal property to which a lien has attached or to make payment of rent or to make payment of a child support payment or to make payment of any taxes, licenses, or fees, or any fine or court costs, or for any other purpose to make or draw or utter or deliver, with the intent to defraud, any check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money upon any in-state or out-of-state bank, person, firm, or corporation, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in, or on deposit with, such bank, person, firm, or corporation for the payment of such check, draft, order, or other form of presentment involving the transmission of account information in full, and any other check, draft, order, or other form of presentment involving the transmission of account information upon such funds then outstanding;

(2) To make, draw, utter, or deliver or to cause or direct the making, drawing, uttering, or delivering of any check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money on any in-state or out-of-state bank, person, firm, or corporation in payment of wages or salaries for personal services rendered, knowing that the maker, drawer, or payor does not have sufficient funds in or on deposit with such bank, person, firm, or corporation for the payment in full of such check, draft, order, or other form of presentment involving the transmission of account information as well as any other then-outstanding check, draft, order, or other form of presentment involving the transmission of account information upon such funds, and with no good reason to believe the check, draft, order, or other form of presentment involving the transmission of account information would be paid upon presentation to the person or bank upon which same was drawn; or

(3) After he or she has made, drawn, uttered, or delivered a check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money upon any in-state or out-of-state bank, to withdraw or cause to be withdrawn, with intent to defraud, the funds or any part of the funds that have been deposited in the bank before presentment of the check, draft, order, or any other form of presentment involving the transmission of account information for payment, without leaving sufficient funds in the bank for payment

in full of the check, draft, order, or other form of presentment involving the transmission of account information and any other check, draft, or order upon the funds then outstanding.

History. Acts 1959, No. 241, §§ 2-4; 1977, No. 155, § 1; 1981, No. 899, §§ 1, 2, 4; 1985, No. 1012, § 1; A.S.A. 1947, §§ 67-720, 67-721, 67-725; Acts 1987, No. 69, § 1; 1991, No. 1051, § 1; 2001, No. 1466, § 1.

Amendments. The 2001 amendment inserted “or any other form of presentment involving the transmission of ac-

count information,” “or other form of presentment involving the transmission of account information” and “or other forms of presentment involving the transmission of account information” throughout this section; made minor punctuation changes in (1); inserted “or she” in (3); and made minor stylistic changes.

RESEARCH REFERENCES

Ark. L. Rev. Henry, Recent Developments, State of Arkansas v. Havens, 1999 WL 162139 (Ark. 1999), 52 Ark. L. Rev. 530.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Murphey, Acceptance and Dishonor: “Payable Through” Drafts and Personal Money Orders, 5 UALR L.J. 519.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Burden of proof.
Defenses.
Elements of offense.
Evidence.
Fraud.
Indictment or information.
Knowledge and intent.
Presumption.
Revocation of probation.
Thing of value.

Construction.

Former similar section was highly penal and must be strictly construed. *Cousins v. State*, 202 Ark. 500, 151 S.W.2d 658 (1941) (decision under prior law).

Applicability.

Checks drawn outside this state upon a bank in this state were within the purview of former similar statute. *Cousins v. State*, 202 Ark. 500, 151 S.W.2d 658 (1941) (decision under prior law).

Former similar section was not applicable to the case of a postdated check as there is nothing in the act which made it unlawful to promise and fail to pay at a future date. *Smith v. State*, 147 Ark. 49,

226 S.W. 531 (1921) (decision under prior law).

Payment of a preexisting debt by a worthless check is not a violation of this section. *Ridenhour v. State*, 279 Ark. 240, 650 S.W.2d 575 (1983).

Burden of Proof.

Proof by the state that the defendant gave a check on a bank which was not paid because he had no money there made a prima facie case of guilt under former section and imposed the burden on the defendant to show that he was not notified so that he might immediately make a deposit to cover the check. *Collier v. State*, 183 Ark. 1057, 40 S.W.2d 455 (1931) (decision under prior law).

In a prosecution for violation of the overdraft statute, the defendant, having failed to make good the check within the statutory period after notice of its dishonor, had the burden of overcoming the prima facie case made against him. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Defenses.

It was no defense that a third person guaranteed payment of the check to the payee and did pay it when it was returned by the bank stamped “No Acct.” *Tolbert v.*

State, 244 Ark. 1067, 428 S.W.2d 264 (1968).

Elements of Offense.

Elements of the offense are: Intent to defraud and making, drawing or delivering a check for the payment of money on a bank, knowing at the time that there were insufficient funds in the account to pay the check. *Smith v. State*, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

It is not essential that defendant received money at the time the check involved was given, if he had received the money before and the check was for payment of the money previously obtained. *Smith v. State*, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Evidence.

Where defendant failed to abstract evidence, conviction could not be reversed on mere showing that check was postdated. *Patterson v. State*, 194 Ark. 488, 107 S.W.2d 545 (1937) (decision under prior law).

Testimony held sufficient to establish that funds in the account were insufficient to pay the check. *Smith v. State*, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Evidence held sufficient to carry the case to the jury on question of presentment, in the absence of specific objection. *Smith v. State*, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Evidence held insufficient to support conviction. *Edens v. State*, 235 Ark. 284, 357 S.W.2d 641 (1962).

Evidence held sufficient to sustain the defendant's conviction. *Reed v. State*, 267 Ark. 1017, 593 S.W.2d 472 (Ct. App. 1980); *Walker v. State*, 10 Ark. App. 189, 662 S.W.2d 196 (1983); *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987).

The giving of a postdated check, bearing the notation, "hold in lieu of loan check," did not constitute a violation of this section as the postdated nature of the check coupled with the memorandum contained therein should have put the payee on notice that the check was not eligible for presentment of payment until a future date and, therefore, intent to defraud was not established. *Bukowczyk v. State*, 73 Ark. App. 307, 42 S.W.3d 590 (2001).

Fraud.

While in some circumstances one could

be guilty of perpetrating a fraud by giving a bad check in payment of a debt, the evidence showed that party was not defrauded by other person giving him a check and all that would be lost would be the time to present a worthless check. *Edens v. State*, 235 Ark. 284, 357 S.W.2d 641 (1962).

Indictment or Information.

It is unnecessary to negative exception by alleging that defendant was notified that check had not been paid. *Collier v. State*, 183 Ark. 1057, 40 S.W.2d 455 (1931) (decision under prior law).

Information charging the giving of a check without sufficient funds and without arrangements to pay the check, and failure to make good within statutory period after notice, was amendable by inserting "and with the intent to defraud." *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Knowledge and Intent.

Intent to defraud and knowledge of insufficient funds may be shown by refusal of payment by the drawee and failure of drawer to make the check good within statutory period after notice. *Smith v. State*, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

In a prosecution under this section, the fact that defendant had made complete restitution before he was arrested does not disprove the intent to defraud, if the original transaction was criminal, the fact that restitution was made is not in itself a defense as the question for the trial court is whether the accused had the requisite dishonest intent in the first instance. *Garroute v. State*, 241 Ark. 285, 408 S.W.2d 485 (1966).

The admission in evidence of other bad checks purportedly issued by the defendant for the purpose of showing "the mode, or method, or scheme of operation of the defendant, the motive and his guilty knowledge and intent" was not error where the court limited the jury's consideration of them to such purpose by its instructions. *Tolbert v. State*, 244 Ark. 1067, 428 S.W.2d 264 (1968).

Other checks previously issued by the defendant upon insufficient funds were admissible as tending to show criminal intent. *Swan v. State*, 245 Ark. 154, 431 S.W.2d 475 (1968).

Presumption.

Failure to pay check within statutory period after notice of its dishonor raised the presumption that it was given with the intent to defraud. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Revocation of Probation.

Because defendant wrote worthless checks at issue after April 15, 1999, the McGhee and Harmon rule did not provide a basis for reversal of the circuit court's grant of the state's May 2003 probation revocation petition on the ground that the circuit court lacked jurisdiction; the latter rule was abolished by Acts 1999, No. 1569. *McCrary v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 24 (Jan. 12, 2005).

Thing of Value.

Where purchaser gave one large check to the seller in exchange for three smaller checks he had previously written to the

seller which had been returned for insufficient funds, the purchaser did not obtain anything of value by his exchange of the checks and therefore, the purchaser could not be found guilty under this section when the large check was also returned for insufficient funds since nothing of value was either given or received by the exchange of checks. *Ridenhour v. State*, 279 Ark. 240, 650 S.W.2d 575 (1983).

Cited: *State v. Jacks*, 243 Ark. 77, 418 S.W.2d 622 (1967); *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973); *In re Porter*, 462 F. Supp. 370 (E.D. Ark. 1978); *Baird v. State*, 266 Ark. 250, 583 S.W.2d 60 (1979); *Knapp v. State*, 283 Ark. 346, 676 S.W.2d 729 (1984); *Machen Ford-Lincoln-Mercury, Inc. v. Michaelis*, 284 Ark. 255, 681 S.W.2d 326 (1984); *Brown v. Hampton*, 51 Bankr. 51 (Bankr. E.D. Ark. 1985); *Gill v. State*, 290 Ark. 1, 716 S.W.2d 746 (1986); *Culpepper v. Biggers*, 742 F. Supp. 528 (E.D. Ark. 1990).

5-37-303. Notice.

(a) For purposes of this section and § 5-37-304, notice that payment was refused by the drawee for lack of funds shall be sent by certified mail, registered mail evidenced by return receipt, or by regular mail supported by an affidavit of mailing, to the address printed on the instrument or given at the time of issuance or to the current residence.

(b)(1) The form of the notice shall be substantially as follows:

“You are hereby notified that the check(s) or instrument(s) listed below (has) (have) been dishonored. Pursuant to Arkansas law, you have ten (10) days from receipt of this notice to tender payment of the total amount of the check(s) or instrument(s), plus the applicable service charge(s) of \$ _____ (not to exceed \$25.00 per check), plus the amount of any fees charged by any financial institution as a result of the check's not being honored, the total amount due being \$ _____. Unless this amount is paid in full within the time specified above, the dishonored check(s) or instrument(s) and all other available information relating to this incident may be turned over to the prosecuting attorney for criminal prosecution.

CHECK NO.	CHECK DATE	CHECK AMOUNT	NAME OF BANK
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____”.

(2) If notice is sent by an affidavit of mailing, the affidavit of mailing shall contain a copy of the notice and shall substantially state:

“Affidavit of Mailing

I am over the age of eighteen (18) years and on _____
(date), I mailed notice of insufficient funds under Arkansas Code
§ 5-37-303 to the addressee set forth below in an official depository
under the exclusive care and custody of the United States Postal
Service in _____ (city, county, state),
addressed as follows:

(name and address of addressee).

_____ (Signature)

_____ (Date)

(Notary)

_____ ”.

(c) Any party holding a dishonored check or instrument and giving notice in substantially similar form to that provided in subsection (b) of this section and in the manner provided in subsection (a) of this section is immune from civil liability and criminal liability if sent in good faith for the giving of the notice and for proceeding under the forms of the notice.

History. Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 1; 1995, No. 335, § 2; 2001, No. 996, § 2; 2003, No. 1732, § 1.

A.C.R.C. Notes. The introductory language of (b) was added by the Arkansas Code Revision Commission for clarity.

Amendments. The 2001 amendment, in the second paragraph of (b), substituted

“\$25.00” for “\$20.00,” inserted “plus the amount ... being honored” and substituted “prosecuting attorney” for “Prosecuting Attorney.”

The 2003 amendment, in (a), substituted “certified mail, registered mail” for “certified or registered mail” and inserted “or by regular mail supported by an affidavit of mailing”; added (b)(2); and made stylistic changes.

RESEARCH REFERENCES

Ark. L. Rev. Henry, Recent Developments, State of Arkansas v. Havens, 1999

WL 162139 (Ark. 1999), 52 Ark. L. Rev. 530.

CASE NOTES

ANALYSIS

In general.
Burden of proof.
Duty of public official.
Notice of arrest.
Presumption.
Service charge.

In General.

While notice from the merchant or holder is required for the state to make a prima facie case for violation of the Arkan-

sas Hot Check Law based upon failure to pay a returned check, notice to the drawer of the check is not a prerequisite to the bringing of criminal charges by the state. State v. Havens, 337 Ark. 161, 987 S.W.2d 686 (1999).

Burden of Proof.

Proof by the state that the defendant gave a check on a bank which was not paid because he had no money there made a prima facie case of guilt under former

section similar to § 5-37-302 and imposed the burden on the defendant to show that he was not notified so that he might immediately make a deposit to cover the check. *Collier v. State*, 183 Ark. 1057, 40 S.W.2d 455 (1931) (decision under prior law).

In a prosecution for violation of the overdraft statute, the defendant, having failed to make good the check within the statutory period after notice of its dishonor, had the burden of overcoming the prima facie case made against him. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Duty of Public Official.

Sheriff did not have a duty to inform defendant that the check he tendered in payment of his fine had been dishonored or demand payment of the fine at some subsequent date. *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987).

Notice of Arrest.

Former law that provided that the giving of a check, payment of which was refused, was prima facie evidence of intent to defraud provided payment wasn't made within statutory period did not require that offender shall have that

amount of notice prior to his arrest. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Presumption.

Failure to pay check within statutory period after notice of its dishonor raised the presumption that it was given with the intent to defraud. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Service Charge.

Although §§ 5-37-304, 5-37-307 and this section specifically provide for a \$15.00 (now \$20.00) maximum service charge on checks returned for insufficient funds, that does not mean they impose no limit on checks returned for any other reason; the General Assembly intended to prohibit the party holding any kind of dishonored check from assessing a collection fee in excess of \$15.00 (now \$20.00) per check. *Cheqnet Sys. v. State Bd. of Collection Agencies*, 319 Ark. 252, 890 S.W.2d 595 (1995).

Cited: *State v. Jacks*, 243 Ark. 77, 418 S.W.2d 622 (1967); *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973); *Culpepper v. Biggers*, 742 F. Supp. 528 (E.D. Ark. 1990).

5-37-304. Evidence against maker or drawer.

(a) For purposes of this section, it is prima facie evidence that the maker or drawer intended to defraud and knew at the time of the making, drawing, uttering, or delivering that the check, draft, order, or other form of presentment involving transmission of account information would not be honored if:

(1) The maker or drawer had no account with the drawee at the time the check, draft, order, or other form of presentment involving transmission of account information was made, drawn, uttered, or delivered; or

(2) The check, draft, order, or other form of presentment involving transmission of account information bears the endorsement or stamp of a collecting bank indicating that the instrument or transmission was returned or otherwise dishonored because of insufficient funds to cover the value; or

(3) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after delivery, and the maker or drawer has not paid the holder the amount due, together with a service charge not to exceed twenty-five dollars (\$25.00), plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored, within ten (10) days after receiving written notice that payment was refused upon the check,

draft, order, or other form of presentment involving transmission of account information.

(b)(1) Nothing impairs the prosecuting attorney's power to immediately file charges after the check has been returned.

(2) The prosecuting attorney may collect restitution, including a service charge, not exceeding twenty-five dollars (\$25.00) per check, plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored, for the payees of the check.

(c) The check, draft, or order bearing an "insufficient" stamp or "no account" stamp from the collecting bank or any other report or stamp from the collecting bank indicating that the check, draft, order, or other form of presentment involving the transmission of account information was dishonored or unable to be paid due to insufficient funds on deposit to cover the value of the check, draft, order, or other form of presentment involving the transmission of account information shall be received as evidence that there were insufficient funds or no account at trial in any court in this state.

(d) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of a banking official if notice of intention to cross-examine is given ten (10) days prior to the date of hearing or trial.

History. Acts 1959, No. 241, § 4; 1981, No. 899, § 3; 1983, No. 473, § 1; A.S.A. 1947, § 67-722; Acts 1987, No. 678, § 1; 1992 (1st Ex. Sess.), No. 44, § 2; 1995, No. 335, § 3; 2001, No. 996, § 3; 2001, No. 1466, § 2.

Publisher's Notes. This section was amended by Acts 2001, Nos. 996 and 1466. The amendment by Acts 2001, No. 1466, was deemed to supersede the amendment by Acts 2001, No. 996.

As amended by Acts 2001, No. 996, subdivision (a)(2) read as follows:

"(a)(2)(A)(i) The check, draft, or order bears the endorsement or stamp of a collecting bank indicating that the instrument was returned because of insufficient funds to cover the value; or

"(ii) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after delivery, and the maker or drawer shall not have paid the holder the amount due, together with a service charge not to exceed twenty-five dollars (\$25.00), plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored, within ten (10) days after receiving written notice that payment was refused upon the check, draft, or order.

"(B) Nothing shall impair the prosecuting attorney's power to immediately file charges after the check has been returned. The prosecuting attorney may collect restitution including a service charge, not exceeding twenty-five dollars (\$25.00) per check, plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored, for the payees of the check."

Amendments. The 2001 amendment by No. 996 substituted "twenty-five dollars (\$25.00) ... not being honored" for "twenty dollars (\$20.00)" in present (a)(3) and (b); and inserted "per check" in (b).

The 2001 amendment by No. 1466 inserted "or other form of presentment involving transmission of account information" throughout; substituted "instrument or transmission was returned or otherwise dishonored because" for "instrument was returned because" in present (a)(2); in present (b)(2), substituted "twenty-five dollars (\$25.00)" for "twenty dollars (\$20.00)" and inserted "plus ... honored"; inserted "or any other ... information" in present (c); and made minor stylistic changes throughout.

RESEARCH REFERENCES

Ark. L. Rev. Henry, Recent Developments, State of Arkansas v. Havens, 1999

WL 162139 (Ark. 1999), 52 Ark. L. Rev. 530.

CASE NOTES

ANALYSIS

Burden of proof.
Evidence.
Jury questions.
Knowledge and intent.
Presumption.
Prima facie case.
Probable cause.
Service charge.

Burden of Proof.

Proof which made a prima facie case of guilt under former section imposed the burden on the defendant to show that he was not notified so that he might immediately make a deposit to cover the check. Collier v. State, 183 Ark. 1057, 40 S.W.2d 455 (1931) (decision under prior law).

In a prosecution for violation of the overdraft statute, the defendant, having failed to make good the check within the statutory period after notice of its dishonor, had the burden of overcoming the prima facie case made against him. Brewer v. State, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

The effect of this section is to cast upon the defendant the burden of going forward with the case. Edens v. State, 235 Ark. 284, 357 S.W.2d 641 (1962).

In order to rebut the inference raised by a prima facie case of intent to defraud, the accused must put on evidence which demonstrates the lack of intent to defraud. Walker v. State, 10 Ark. App. 189, 662 S.W.2d 196 (1983).

Evidence.

Where appellant failed to abstract evidence, conviction cannot be reversed on mere showing that check was postdated. Patterson v. State, 194 Ark. 488, 107 S.W.2d 545 (1937) (decision under prior law).

Testimony held sufficient to establish that funds in the account were insufficient to pay the check. Smith v. State, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Evidence held sufficient to carry the

case to the jury on question of presentment, in the absence of specific objection. Smith v. State, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Evidence held insufficient to support conviction. Edens v. State, 235 Ark. 284, 357 S.W.2d 641 (1962).

Evidence held sufficient to support conviction. Walker v. State, 10 Ark. App. 189, 662 S.W.2d 196 (1983).

Jury Questions.

Whether testimony was sufficient to overcome the state's prima facie case was for the jury. Walker v. State, 10 Ark. App. 189, 662 S.W.2d 196 (1983).

Knowledge and Intent.

Intent to defraud and knowledge of insufficient funds may be shown by refusal of payment by the drawee and failure of drawer to make the check good within statutory period after notice. Smith v. State, 206 Ark. 154, 174 S.W.2d 555 (1943) (decision under prior law).

Check alleged to have been issued by defendant, bearing his purported signature and the bank's stamp of "No Acct.", was sufficient evidence of fraudulent intent. Tolbert v. State, 244 Ark. 1067, 428 S.W.2d 264 (1968).

In a prosecution for writing bad checks it was error for the trial court to exclude previous banking statements which showed that defendant had had an overdraft arrangement with the bank; the previous statements were relevant to rebut the inference of an intent to defraud. Brimm v. State, 14 Ark. App. 6, 683 S.W.2d 940 (1985).

Presumption.

Failure to pay check within statutory period after notice of its dishonor raised the presumption that it was given with the intent to defraud. Brewer v. State, 195 Ark. 477, 112 S.W.2d 976 (1938) (decision under prior law).

Prima Facie Case.

When the original check is introduced with an endorsement from the bank upon

which it was drawn that it was returned unpaid because of insufficient funds, the state has made a prima facie case. *Rice v. State*, 240 Ark. 674, 401 S.W.2d 562 (1966); *Collier v. State*, 183 Ark. 1057, 40 S.W.2d 455 (1931); *Walker v. State*, 10 Ark. App. 189, 662 S.W.2d 196 (1983).

Probable Cause.

There was ample probable cause to justify check-writer's arrest. *Culpepper v. Biggers*, 742 F. Supp. 528 (E.D. Ark. 1990).

Service Charge.

Although §§ 5-37-303, 5-37-307, and this section specifically provide for a

\$15.00 (now \$20.00) maximum service charge on checks returned for insufficient funds, that does not mean they impose no limit on checks returned for any other reason; the General Assembly intended to prohibit the party holding any kind of dishonored check from assessing a collection fee in excess of \$15.00 (now \$20.00) per check. *Cheqnet Sys. v. State Bd. of Collection Agencies*, 319 Ark. 252, 890 S.W.2d 595 (1995).

Cited: *State v. Jacks*, 243 Ark. 77, 418 S.W.2d 622 (1967); *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973); *Culpepper v. Biggers*, 742 F. Supp. 528 (E.D. Ark. 1990).

5-37-305. Penalties.

(a) Upon a determination of guilt, in the event that the order, draft, check, or other form of presentment involving the transmission of account information is two hundred dollars (\$200) or less, the penalties are as follows:

(1) **FIRST OFFENSE.** A fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or imprisonment in the county jail or regional detention facility not to exceed thirty (30) days, or both;

(2) **SECOND OFFENSE.** A fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or imprisonment in the county jail or regional detention facility not to exceed ninety (90) days, or both; and

(3) **THIRD AND SUBSEQUENT OFFENSES.** A fine of not less than two hundred dollars (\$200) nor more than two thousand dollars (\$2,000) or imprisonment in the county jail or regional detention facility not to exceed one (1) year, or both.

(b)(1) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on a nonexistent account is a Class B felony if:

(A) The amount of any one (1) instrument or transaction is two thousand five hundred dollars (\$2,500) or more; or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, and each instrument or transaction is in an amount less than two thousand five hundred dollars (\$2,500), and the total amount of all such instruments or transactions is two thousand five hundred dollars (\$2,500) or more.

(2) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class C felony if:

(A) The amount of any one (1) instrument or transaction is less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an

amount less than two hundred dollars (\$200), and the total amount of all such instruments or transactions is less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200).

(3) Under subdivisions (b)(1)(B) and (b)(2)(B) of this section, each instrument or transaction may be added together in a single prosecution.

(c)(1) Any court passing sentence upon a person convicted of any offense, pursuant to a provision of §§ 5-37-301-5-37-306, may also order the person to make full restitution to the plaintiff or complaining party.

(2) Any court costs may be taxed to the convicted defendant.

History. Acts 1959, No. 241, § 5; 1961, No. 500, § 1; 1977, No. 766, § 1; 1981, No. 899, § 5; 1983, No. 473, § 2; 1983, No. 719, § 4; 1985, No. 254, § 1; A.S.A. 1947, § 67-723; Acts 2001, No. 1466, § 3.

Amendments. The 2001 amendment

inserted "transaction" and "transactions" throughout; inserted "or other form ... information" in (a); redesignated the first sentence of former (c) as present (c)(1); and redesignated the last sentence of former (c) as present (c)(2).

RESEARCH REFERENCES

Ark. L. Rev. The Impecunious Economics of Criminal Justice, 26 Ark. L. Rev. 478.

CASE NOTES

Cited: Tolbert v. State, 244 Ark. 1067, 428 S.W.2d 264 (1968); Hawkins v. State, 251 Ark. 955, 475 S.W.2d 887 (1972).

5-37-306. Prosecutions.

(a)(1) A prosecution for a violation of this subchapter may be in the county of residence of the drawer or of the payee of the check, draft, or order, or in the county where the drawee bank is located.

(2) However, in any case involving a child support payment processed by the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration, the prosecution for the violation may be in Pulaski County.

(b) It is expressly intended in this section for the drawee, or for a third party holder in due course of a check, draft, or order, payment of which is refused by the drawee, to have the right to initiate and maintain the prosecution of a criminal charge against the maker of the check, draft, or order, whether or not the original payee consents to the action.

(c)(1) In any prosecution under the Arkansas Hot Check Law, process shall be issued and served in the county or out of the county where the prosecution is pending and have the same binding force and effect as though the offense being prosecuted were a felony.

(2) Any officer issuing and serving process in or out of the county where the prosecution is pending and any witness from within or

without the county where the prosecution is pending shall be compensated in like manner as though the offense were a felony in grade.

History. Acts 1959, No. 241, § 6; 1961, 1995, No. 1184, § 40.
No. 500, § 2; 1981, No. 849, § 1; 1985, No. **Cross References.** Prosecutors' fees,
254, § 2; A.S.A. 1947, § 67-724; Acts § 21-6-411.

CASE NOTES

Venue.

Violation of the former Overdraft Act was consummated when the check was executed and delivered and the venue was

not transitory. *Edwards v. State*, 232 Ark. 403, 337 S.W.2d 865 (1960) (decision under prior law).

5-37-307. Knowingly issuing worthless check.

(a) A person commits an offense if he or she issues or passes a check, order, draft, or any other form of presentment involving the transmission of account information for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check, order, draft, or any other form of presentment involving the transmission of account information, as well as any other check, order, draft, or any other form of presentment involving the transmission of account information outstanding at the time of issuance.

(b)(1) This section and § 21-6-411 do not apply to a preexisting debt or a situation in which nothing of value was acquired.

(2) However, this section and § 21-6-411 do apply to a payment of rent, child support, consignment, tax, license, fee, fine, and court costs.

(c)(1) This section does not prevent the prosecuting attorney from establishing the required knowledge by direct evidence.

(2) However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed, except in the case of a postdated check, order, draft, or any other form of presentment involving the transmission of account information if:

(A) The issuer had no account with the bank or other drawee at the time he or she issued the check, order, draft, or any other form of presentment involving the transmission of account information; or

(B) Payment was refused by the bank or other drawee for lack of funds or insufficient funds on presentation within thirty (30) days after issue and the issuer failed to pay the holder in full, plus a service charge not to exceed twenty-five dollars (\$25.00), plus the amount of any fees charged to the holder of the check by any financial institution as a result of the check's not being honored, within ten (10) days after receiving notice of that refusal.

(d) Notice for purposes of this section shall be by the procedure as set forth in §§ 5-37-303 and 5-37-304.

(e) If notice is given, it is presumed that the notice was received no later than five (5) days after it was sent.

(f) An offense under this section is a violation and is punishable as provided in § 5-4-104.

(g) This act is cumulative to all other acts and shall not repeal any other act.

History. Acts 1985 (1st Ex. Sess.), No. 33, §§ 1, 4; A.S.A. 1947, §§ 67-726, 67-728n; Acts 1987, No. 69, § 2; 1987, No. 678, § 2; 1991, No. 1051, § 2; 1995, No. 335, § 4; 2001, No. 996, § 4; 2001, No. 1466, § 4.

Publisher's Notes. Acts 1985 (1st Ex. Sess.), No. 33, § 3, provided that in counties where the sheriff operates a hot check program and the prosecuting attorney does not operate such a program on September 20, 1985, the sheriff shall be entitled to continue the program as long as he elects to do so and the prosecuting attorney shall not initiate any such program in the county unless the sheriff in the county discontinues his program.

Amendments. The 2001 amendment

by No. 996 substituted "twenty-five dollars (\$25.00) ... not being honored" for "twenty dollars (\$20.00)" in present (c)(2)(B).

The 2001 amendment by No. 1466 inserted "or any other form of presentment involving the transmission of account information" throughout; inserted "or she" twice in present (c)(2)(A); substituted "twenty-five ... being honored" for "twenty dollars (\$20.00)" in present (c)(2)(B); and made related changes.

Meaning of "this act". Acts 1985 (1st Ex. Sess.), No. 33, codified as §§ 5-37-307, 16-21-120, 21-6-411.

Cross References. Fees from persons issuing bad checks, § 16-21-120.

CASE NOTES

Service Charge.

Although §§ 5-37-303, 5-37-304 and this section specifically provide for a \$15.00 (now \$20.00) maximum service charge on checks returned for insufficient funds, that does not mean they impose no limit on checks returned for any other reason; the General Assembly intended to

prohibit the party holding any kind of dishonored check from assessing a collection fee in excess of \$15.00 (now \$20.00) per check. *Cheqnet Sys. v. State Bd. of Collection Agencies*, 319 Ark. 252, 890 S.W.2d 595 (1995) (decision under former law).

SUBCHAPTER 4 — CABLE TELEVISION

SECTION.

5-37-401. Definitions.

5-37-402. Theft of communication services — Unlawful communication and access devices.

5-37-403. Penalties.

SECTION.

5-37-404. Possession of devices as evidence of intent — Presumption.

5-37-405. Satellite dish.

5-37-406. Venue.

5-37-407. Additional civil remedies.

Publisher's Notes. Acts 1985, No. 781, § 7, provided that no provision of the Act would be repealed by a subsequent enactment of the Legislature unless the enactment clearly indicates the repeal is intended.

Effective Dates. Acts 1985, No. 781, § 8: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the theft of

cable television services is becoming more and more prevalent; that there is urgent need for legislation to make it illegal and punishable both criminally and civilly for a theft of cable television services; that this Act is designed to correct this situation and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public

peace, health and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

5-37-401. Definitions.

As used in this subchapter:

(1) “Communication device” means:

(A) Any type of electronic mechanism, transmission line or connection and an appurtenance to a transmission line or connection, instrument, device, machine, equipment, technology, or software that is capable of intercepting, transmitting, retransmitting, acquiring, decrypting, or receiving any communication service or functionality, including the receipt, acquisition, interception, transmission, retransmission, or decryption of communication service provided by or through any cable television, fiber optic, telephone, satellite, microwave, data transmission, radio, internet-based, or wireless distribution network, system, or facility; and

(B) Any component of the communication device, including any electronic serial number, mobile identification number, personal identification number, computer circuit, splitter, connectors, switches, transmission hardware, security module, smart card, software, computer chip, or electronic mechanism or any component, accessory, or part of any communication device that is capable of facilitating the interception, transmission, retransmission, decryption, acquisition, or reception of any communication service or functionality;

(2) “Communication service” means:

(A) Any service lawfully provided for a charge or compensation to facilitate the lawful origination, transmission, emission, or reception of a sign, signal, data, writing, image, sound, or intelligence of any nature by telephone, including a cellular or other wireless telephone, wire, wireless, radio, electromagnetic, photoelectric, or photo optical system, network, or facility; and

(B) Any service lawfully provided for a charge or compensation by any cable television, radio, fiber optic, photo optical, electromagnetic, photoelectric, photoelectronic, satellite, microwave, data transmission, wireless, or internet-based distribution system, network, or facility, including, but not limited to, any electronic, data, video, audio, internet access, telephonic, microwave, or radio communication, transmission, signal, or service and any communication, transmission, signal, or services lawfully provided, directly or indirectly, by or through any system, network, or facility described in this subdivision (2)(B);

(3) “Communication service provider” means any person or entity:

(A) Owning or operating any cable television, fiber optic, photo optical, electromagnetic, photoelectric, photoelectronic, satellite, Internet-based, telephone, wireless, microwave, data transmission, or radio distribution system, network, or facility;

(B) Providing a communication service, whether directly or indirectly as a reseller, including, but not limited to, a cellular, paging, or other wireless communications company, or other person or entity that for a fee supplies the facility, cell site, mobile telephone switching office, or other equipment or communication service; and

(C) Providing any communication service, directly or indirectly, by or through any distribution system, network, or facility described in this subdivision (3);

(4) “Manufacture, assembly, or development of a communication device” means to make, produce, develop, or assemble a communication device, or to knowingly assist another to make, produce, develop, or assemble a communication device;

(5) “Manufacture, assembly, or development of an unlawful access device” means to make, develop, produce, or assemble an unlawful access device or to modify, alter, program, or reprogram any instrument, device, machine, equipment, technology, or software for the purpose of defeating or circumventing any effective technology, device, or software used by the provider, owner, or licensee of a communication service, or of any data, audio, or video program or transmission, to protect any such communication, data, audio, or video service, program, or transmission from unauthorized receipt, interception, acquisition, access, decryption, disclosure, communication, transmission, or retransmission, or to knowingly assist another in an activity described in this subdivision (5);

(6) “Multipurpose device” means any communication device that is capable of more than one (1) function and includes any component of the communication device; and

(7) “Unlawful access device” means any type of instrument, device, machine, equipment, technology, or software that is primarily designed, developed, assembled, manufactured, sold, distributed, possessed, used, offered, promoted, or advertised for the purpose of defeating or circumventing any effective technology, device, or software, or any component or part of an effective technology, device, or software used by the provider, owner, or licensee of any communication service or of any data, audio, or video program or transmission, to protect any communication, data, audio, or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

History. Acts 1985, No. 781, § 1; A.S.A. 1947, § 41-2210; Acts 2003, No. 1806, § 1.

Amendments. The 2003 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Law, Forgery and Fraudulent Practices, Arkansas General Assembly, Criminal 26 UALR L.J. 376.

5-37-402. Theft of communication services — Unlawful communication and access devices.

(a) A person commits theft of communication services if he or she knowingly and with the intent to defraud a communication service provider:

(1) Obtains or attempts to obtain or uses a communication service without the authorization of or proper compensation paid to the communication service provider, or assists or instructs any other person in doing so with the intent to defraud the communication service provider;

(2) Tampers with, modifies, or maintains a modification to a communication device installed or provided by the communication service provider with the intent to defraud that communication service provider;

(3) Possesses with the intent to distribute, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells or offers, promotes or advertises for sale, use, or distribution any communication device:

(A) For the commission of a theft of a communication service or to receive, intercept, disrupt, transmit, retransmit, decrypt, or acquire or facilitate the receipt, interception, disruption, transmission, retransmission, decryption, or acquisition of any communication service without the express consent or express authorization of the communication service provider, as stated in a contract or otherwise; or

(B) With the intent to conceal or to assist another to conceal from any communication service provider or from any lawful authority the existence or place of origin or destination of any communication, provided that the concealment is for the purpose of committing a violation of subdivision (a)(2)(A) of this section;

(4) Tampers or otherwise interferes with or connects to by any means, whether mechanical, electrical, acoustical, or other means, any cable, wire, or other device used for the distribution of cable television without authority from the operator of the service, modifies, alters, programs, or reprograms a communication device for a purpose described in subdivision (2) of this section;

(5) Possesses, uses, manufactures, develops, assembles, distributes, imports into this state, licenses, transfers, leases, sells, offers, promotes, or advertises for sale, use, or distribution any unlawful access device; or

(6) Possesses, uses, prepares, distributes, sells, gives, transfers, offers, promotes, or advertises for sale, use, or distribution any:

(A) Plans or instructions for making, assembling, or developing any unlawful access device under circumstances evidencing an intent

to use or employ the communication device or unlawful access device, or to allow the communication device or unlawful access device to be used or employed for a purpose prohibited by this subchapter, or knowing or having reason to believe that the communication device or unlawful access device is intended to be so used, or that the plans or instructions are intended to be used for manufacturing or assembling the communication device or unlawful access device for a purpose prohibited by this subchapter; or

(B) Material, including hardware, a cable, a tool, data, computer software, or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, assembly, or development of a communication device for a purpose prohibited by this subchapter, or for use in the manufacture, assembly, or development of an unlawful access device.

(b)(1) However, nothing in this section shall be construed to prohibit the manufacture, importation, sale, lease, or possession of any television device possessing the internal hardware necessary to receive a cable television signal without the use of a converter, device, or box, or of any television advertised as "cable ready".

(2) A person that manufactures, produces, assembles, designs, sells, distributes, licenses, or develops a multipurpose device is not in violation of this section unless that person acts knowingly and with an intent to defraud a communication service provider and the multipurpose device:

(A) Is manufactured, developed, assembled, produced, designed, distributed, sold, or licensed for the primary purpose of committing a violation of this section;

(B) Has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of any other violation of this section; or

(C) Is marketed by that person or another person in concert with that person with that person's knowledge for use as an unlawful access device or for the purpose of committing any other violation of this section.

(3) Nothing in this section requires that the design of or design and selection of a part, software code, or component for a communication device provide for a response to any particular technology, device, or software, or any component or part thereof, used by the provider, owner, or licensee of any communication service or of any data, audio or video program, or transmission to protect any such communication, data, audio or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

(4) This section does not apply to the following entities or persons when lawfully acting in the capacity listed in this subdivision (b)(4) and as expressly authorized to do so by any other state or federal statute or regulation:

(A) State or local law enforcement agency;

- (B) State or local government authority, municipality, or agency;
and
- (C) Communication service provider.

History. Acts 1985, No. 781, § 2; A.S.A. 1947, § 41-2211; Acts 1997, No. 348, § 1; 2003, No. 1806, § 2. **Amendments.** The 2003 amendment rewrote this section.

5-37-403. Penalties.

(a)(1) Upon conviction, any person violating a provision of § 5-37-402(a)(1) or (2) is guilty of a Class B misdemeanor.

(2) Upon conviction, any person violating a provision of § 5-37-402(a)(3)-(6) is guilty of a Class D felony.

(3) An offense under this subchapter is a Class C felony if:

(A) The defendant has been convicted previously on two (2) or more occasions for an offense under this subchapter or for any similar crime in this state or any federal or other state jurisdiction; or

(B) The violation of this subchapter involves possession of more than fifty (50) communication devices or unlawful access devices.

(b) The penalty for an offense under this section when based upon a prior conviction, includes, but is not limited to, a felony offense involving theft of service or fraud under this subchapter or a violation of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, as in effect on March 1, 2003.

(c) The court shall sentence a person convicted of violating this subchapter to make restitution as authorized by law, in addition to any other sentence authorized by law.

(d) Upon conviction of a defendant under this subchapter, the court may direct that the defendant forfeit any communication device or unlawful access device in the defendant's possession or control that was involved in the violation for which the defendant was convicted, in addition to any other sentence authorized by law.

History. Acts 1985, No. 781, § 3; A.S.A. 1947, § 41-2212; Acts 1997, No. 348, § 2; 2003, No. 1806, § 3. **U.S. Code.** The federal Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, is codified as a note under 47 U.S.C.S. § 609.

Amendments. The 2003 amendment rewrote this section.

5-37-404. Possession of devices as evidence of intent — Presumption.

(a) In a prosecution for a violation of this subchapter, the following constitute prima facie evidence of both the defendant's intent to violate a provision of this subchapter and a violation of a provision of this subchapter:

(1) The existence on the property and in the actual possession of the defendant of any communication device or unlawful access device that is connected in such a manner as would permit the receipt of a communication service without the communication service's being

reported for payment to and specifically authorized by the communication service provider; or

(2) The existence on the property and in the actual possession of the defendant when the totality of the circumstances, including quantity or volume, surrounding the defendant's arrest indicates possession for resale of any device designed, in whole or in part, to facilitate the performance of any illegal act set out in § 5-37-402.

(b) It is presumed that any person who receives a communication service to his or her residence, dwelling, or business is criminally and civilly liable for the conduct of another person at the residence, dwelling, or business for any violation of a provision of this subchapter.

History. Acts 1985, No. 781, § 4; A.S.A. 1947, § 41-2213; Acts 2003, No. 1806, § 4.

Amendments. The 2003 amendment rewrote (a)(1); substituted "a communica-

tion service to his or her residence" for "cable television service to their residence" in (b); and made stylistic changes.

5-37-405. Satellite dish.

The provisions of this subchapter shall not be construed or otherwise interpreted to prohibit an individual from owning or operating a device commonly known as a "satellite receiving dish" for the purpose of lawfully receiving and utilizing a satellite-relayed television signal for his or her own use.

History. Acts 1985, No. 781, § 5; A.S.A. 1947, § 41-2214; Acts 2003, No. 1806, § 5.

Amendments. The 2003 amendment inserted "lawfully" and "or her."

5-37-406. Venue.

(a) An offense or violation of § 5-37-402 may be deemed to have been committed at either the place where the defendant manufactures, develops, or assembles a communication device or unlawful access device or assists another in doing so or the place where the communication device or unlawful access device is sold or delivered to a purchaser or recipient.

(b) It is no defense to a violation of § 5-37-402 that some of the acts constituting the violation occurred outside of this state.

History. Acts 2003, No. 1806, § 6.

5-37-407. Additional civil remedies.

(a)(1) In addition to any other provision of this subchapter, any person aggrieved by a violation of this subchapter may bring a civil action in any court of competent jurisdiction.

(2) "Any person aggrieved" includes any communication service provider.

(b) The court may:

(1) Award declaratory relief and any other equitable remedy, including a preliminary or final injunction to prevent or restrain a violation of

this subchapter, without requiring proof that the plaintiff has suffered or will suffer actual damages or irreparable harm or lacks an adequate remedy at law;

(2) At any time while an action is pending, order the impounding, on such terms as it deems reasonable, of any communication device or unlawful access device that is in the custody or control of the violator and that the court has reasonable cause to believe was involved in the alleged violation of this subchapter;

(3) Award damages as described in subsection (c) of this section;

(4) In the court's discretion, award reasonable attorney fees, costs, and expenses to an aggrieved party who prevails; and

(5) As part of a final judgment or decree finding a violation of this subchapter, order the remedial modification or destruction of any communication device or unlawful access device or any other device or equipment involved in the violation that is in the custody or control of the violator or has been impounded under subdivision (b)(2) of this section.

(c) Damages awarded by a court under this subchapter shall be computed as either of the following:

(1)(A) Upon his or her election of damages at any time before final judgment is entered, the complaining party may recover the actual damages suffered by him or her as a result of the violation of this subchapter and any profits of the violator that are attributable to the violation.

(B) Actual damages include the retail value of any communication service illegally available to a person to whom the violator directly or indirectly provided or distributed any communication device or unlawful access devices.

(C) In proving actual damages, the complaining party shall prove only that the violator manufactured, distributed, or sold any communication device or unlawful access devices.

(D) In determining the violator's profits, the complaining party shall prove only the violator's gross revenue and the violator shall prove his or her deductible expenses; or

(2) Upon election by the complaining party at any time before final judgment is entered, that party may recover in lieu of actual damages, an award of statutory damages of one thousand dollars (\$1,000) for each communication device or unlawful access device involved in the action, with the amount of statutory damages to be determined by the court, as the court considers just.

(d) In any case in which the court finds that any violation of this subchapter was committed willfully and for a purpose of commercial advantage or private financial gain, the court in its discretion may increase the total award of any damages under subsection (c) of this section by an amount of not more than fifty thousand dollars (\$50,000) for each communication device or unlawful access device involved in the action or for each day the defendant was in violation of this subchapter.

History. Acts 2003, No. 1806, § 6.

SUBCHAPTER 5 — BUSINESS AND COMMERCIAL OFFENSES GENERALLY

SECTION.

- 5-37-501. Animals — Altering teeth or failing to disclose defects.
- 5-37-502. Animals — Marking, branding, or altering brands.
- 5-37-503. Animals — False registration or pedigree.
- 5-37-504. Horses — Behavior alteration before sale.
- 5-37-505 — 5-37-509. [Reserved.]
- 5-37-510. Unauthorized copying or sale of recordings.
- 5-37-511 — 5-37-514. [Reserved.]
- 5-37-515. False advertising generally.
- 5-37-516 — 5-37-519. [Reserved.]

SECTION.

- 5-37-520. Misrepresentation of nature of business.
- 5-37-521. Farm implements — Removal or alteration of serial number.
- 5-37-522. Tobacco — Removal of serial number on container.
- 5-37-523. [Repealed.]
- 5-37-524. Fraud in the acquisition of authorization to provide motor vehicle transportation of property.
- 5-37-525. Defrauding a materialman.

Cross References. Fines, § 5-4-201.

Selling diseased animals, penalty, § 5-62-116.

Term of imprisonment, § 5-4-401.

Theft of property by deception, § 5-36-103.

Effective Dates. Acts 1887, No. 134, § 2: effective on passage.

Acts 1937, No. 11, § 4: Feb. 2, 1937.

Acts 1953, No. 157, § 4: approved Feb. 26, 1953. Emergency clause provided: "The General Assembly finds and declares that with the large number of tractors, trailers and other farm implements now in use, it is essential in order to pass title and to effectively impose liens upon such articles that they be identified by the serial or other number or mark used by the manufacturer; that there is an increasing trend toward the removal and alteration of such numbers and marks, for the fraudulent purpose of facilitating the disposition of stolen articles and an emergency is therefore found to exist whereby for the preservation of the public peace, health and safety, it is necessary that this Act shall be in full force and effect from and after its passage."

Acts 1959, No. 240, § 3: Mar. 25, 1959. Emergency clause provided: "Whereas, many persons in this State sell or offer for sale strawberries packaged in such a manner as to misrepresent the true characteristics of the strawberries so packaged; that such misrepresentation is working

serious injury to the strawberry industry of this State; and that only by the immediate passage of this Act may such situation be corrected. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1963, No. 251, § 4: Mar. 18, 1963. Emergency clause provided: "It is hereby found and determined by the General Assembly that the removal or defacing of the serial or code number on containers of tobacco products hinders the collection of the tax thereon and makes it difficult to trace stolen products and that this Act is immediately necessary to correct this situation. Therefore an emergency is hereby declared to exist and this Act being necessary for the preservation of public peace, health and safety shall be in effect from the date of its passage and approval."

Acts 1989, No. 303, § 4: Mar. 2, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present laws of this state are not sufficient to protect materialmen and the public from contractors who knowingly and willfully fail to pay a supplier or subcontractor for materials or goods furnished to a project; that this act establishes criminal penalties for such conduct; and that this act should become effective immediately to protect material-

men and the public in general. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace,

health and safety shall be in full force and effect from and after its passage and approval."

5-37-501. Animals — Altering teeth or failing to disclose defects.

(a) It is declared to be unlawful for any person in any manner to change or alter or cause to be changed or altered the teeth of any mule, horse, or other livestock with an intention to deceive a person to whom the livestock is offered for sale.

(b) Any person who with the intent to defraud or cheat another person designedly represents any livestock that he or she offers for sale to another person as being of a markedly superior quality or who fails to reveal a material physical defect of the animal when selling the animal to another person is guilty of a Class C misdemeanor.

History. Acts 1937, No. 11, §§ 1-3; Pope's Dig., §§ 3082-3084; A.S.A. 1947, §§ 41-2351 — 41-2353; Acts 2005, No. 1994, § 408.

in (b), inserted "or she" and "Class C" and deleted "and be punished as specified in this section" following "misdemeanor"; and deleted former (c).

Amendments. The 2005 amendment,

RESEARCH REFERENCES

Ark. L. Notes. Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and

the Uniform Commercial Code, 1990 Ark. L. Notes 75.

5-37-502. Animals — Marking, branding, or altering brands.

If any person shall mark, brand, or alter the mark or brand of any animal being the property of another person with an intent to steal or convert the carcass or skin of the animal to his or her own use or to prevent identification by the true owner, then upon conviction the person shall be punished in the same manner prescribed by law for theft of the value of the animal.

History. Chapters of Digest p. 232 (Apr. 12, 1869), § 1; C. & M. Dig., § 2508; Pope's Dig., § 3159; A.S.A. 1947, § 41-2374; Acts 2005, No. 1994, § 292.

Amendments. The 2005 amendment deleted "the subject of larceny" following "brand of any animal" and substituted "theft" for "feloniously stealing property."

CASE NOTES

Value.

In an indictment for a felony consisting of feloniously altering the mark of a hog with the intent to steal the same, it is

unnecessary to allege the value of the animal. *Houston v. State*, 66 Ark. 607, 53 S.W. 44 (1899).

5-37-503. Animals — False registration or pedigree.

Any person who by any false pretense obtains from any club, association, society, or company for improving the breed of cattle, horses, sheep, swine, or other domestic animals a certificate of registration of any animal in the herd register or other register of the club, association, society, or company, or a transfer on any registration, and any person who knowingly gives a false pedigree of any animal, upon conviction is guilty of a Class A misdemeanor.

History. Acts 1887, No. 134, § 1, p. 233; C. & M. Dig., § 304; Pope's Dig., § 318; A.S.A. 1947, § 41-2373; Acts 2005, No. 1994, § 346.

Amendments. The 2005 amendment substituted "guilty of a Class A misdemeanor" for "punished by imprisonment

in the Department of Correction for a term not exceeding three (3) years or in the county jail for a term not exceeding one (1) year or by a fine not exceeding one thousand dollars (\$1,000), or by both fine and imprisonment."

5-37-504. Horses — Behavior alteration before sale.

(a) It is unlawful for any person to sell any horse or mule that has been treated in any manner with a behavior-altering substance within the previous twenty-four (24) hours.

(b)(1) Notwithstanding any other law to the contrary, a buyer may rescind the sale of a horse or mule and receive full repayment of any moneys paid if the horse or mule has been treated with a behavior-altering substance within twenty-four (24) hours of the sale.

(2) However, if the expiration of the twenty-four (24) hours falls on a weekend or holiday, the right to rescind extends through the next business day following the weekend or holiday.

(c) Any violation of a provision of this section is a Class A misdemeanor.

(d) This section does not apply to any horse claimed in a claiming race at a licensed racetrack under the jurisdiction of the Arkansas Racing Commission if the treatment otherwise subject to this section consists only of a medication that may be administered to the horse without violating any applicable rule of the commission.

History. Acts 2003, No. 363, § 1.

5-37-505 — 5-37-509. [Reserved.]**5-37-510. Unauthorized copying or sale of recordings.**

(a) As used in this section:

(1) "Owner" means the person who owns the:

(A) Original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing a sound on a recording upon which sound is recorded and from which the transferred recorded sound is directly derived; or

(B) Right to record a live performance;

(2) "Person" means any individual, firm, partnership, corporation, or association; and

(3) "Recording" means the tangible medium on which sound or image is recorded or otherwise stored and includes any phonograph record, audio or video disc, audio or video tape, wire, film, or other medium now known or later developed on which a sound or image is recorded or otherwise stored.

(b) It is unlawful for any person for commercial advantage or private financial gain knowingly to:

(1) Transfer or cause to be transferred any sound recorded on a phonograph record, disc, wire, tape, film, or other article on which a sound is recorded, or any live performance, onto any recording without the consent of the owner; or

(2) Sell, distribute, circulate, offer for sale, distribution, or circulation, possess for the purpose of sale, distribution, or circulation, cause to be sold, distributed, or circulated, offered for sale, distribution, or circulation, or possessed for sale, distribution, or circulation, any recording on which a sound or a performance has been transferred, knowing it to have been made without the consent of the owner.

(c) It is unlawful for any person for commercial advantage or private financial gain to sell, distribute, circulate, offer for sale, distribution, or circulation, or possess for the purposes of sale, distribution, or circulation, any recording on which a sound or image has been transferred unless the recording bears the actual name and address of the transferor of the sound or image in a prominent place on the recording's outside face, label, cover, jacket, or package.

(d) This section does not apply to any person who transfers or causes to be transferred any sound or image:

(1) Intended for or in connection with radio or television broadcast transmission, for communication media, or a related use;

(2) For an archival purpose;

(3) For an educational purpose, with no compensation being derived as a result of the transfer;

(4) For the internal operation of a business;

(5) With prior authorization by a court of competent jurisdiction; or

(6) Solely for the personal use of the person transferring or causing the transfer if the person transferring or causing the transfer has no intention to evade a provision or intent of this section if proof of intent is an element of the offense.

(e)(1) Upon conviction, any person violating a provision of this section is guilty of a Class A misdemeanor for the first offense involving fewer than one hundred (100) sound recordings or fewer than seven (7) audiovisual recordings.

(2) For a subsequent offense, and for an offense involving one hundred (100) or more sound recordings or seven (7) or more audiovisual recordings, the person is guilty of a Class D felony and is subject to an additional fine not to exceed two hundred fifty thousand dollars (\$250,000).

(f) This section does not enlarge or diminish the right of a party in private litigation.

(g) When a person is convicted of any violation of this section, the court in its judgment of conviction shall order the forfeiture and destruction or other disposition of any recording that does not conform to a requirement of this section and any implement, device, label, or equipment used in the manufacture of the recording.

(h)(1) Upon discovery, it is the duty of any law enforcement officer to confiscate any recording that does not conform to a provision of this section.

(2) It is the duty of law enforcement, by court order, to destroy or otherwise dispose of a recording described in subdivision (h)(1) of this section.

History. Acts 1977, No. 764, §§ 1, 2; A.S.A. 1947, §§ 41-2375, 41-2376; Acts 1991, No. 490, § 1; 1999, No. 1578, § 2; 2005, No. 1994, § 461.

A.C.R.C. Notes. Acts 1999, No. 1578, § 3, provides that: "Nothing in this Act shall be construed to conflict with the Freedom of Information Act."

Amendments. The 2005 amendment redesignated former (a)(1)(B)(1) and (a)(1)(B)(2) as present (a)(2) and (a)(3); deleted former (h)(2)(A) and (B); and added present (h)(2).

5-37-511 — 5-37-514. [Reserved.]

5-37-515. False advertising generally.

(a)(1) It is the purpose and intent of this section to prohibit false, fraudulent, and misleading advertising and to prescribe a penalty for a person purchasing false, fraudulent, and misleading advertising in a newspaper, on radio or television, or otherwise causing false, fraudulent, and misleading advertising to be placed before the public.

(2) It is not the intention of this section and nothing in this section shall be construed to penalize or place responsibility upon any newspaper, radio station, television station, publisher, or other person, firm, or corporation for publishing, broadcasting, telecasting, or otherwise disseminating any advertisement purchased by any person, firm, corporation, or association.

(b) No person, firm, corporation, group, or association, with intent to sell or in anywise dispose of real estate, merchandise, a security, service, or anything offered by that person, firm, corporation, group, or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof or to induce the public in any manner to enter into any obligation relating thereto or to acquire title thereto or an interest therein, shall make, publish, disseminate, circulate, or place before the public or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, on radio or television, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of

any sort regarding real estate, merchandise, a security, service, or anything so offered to the public, which advertisement contains any assertion, representation, or statement of fact that is untrue, deceptive, or misleading.

(c)(1) It is deemed deceptive advertising, within the meaning of this subsection, for any person, firm, or corporation, engaged in the business of buying or selling new or secondhand merchandise, wearing apparel, jewelry, furniture, a piano, phonograph, or other musical instrument, motor vehicle, stock, or, generally, any form of real, personal, or mixed property, or in the business of furnishing any kind of service or investment to advertise such articles, property, or service for sale, in any manner indicating that the sale is being made by a private party or householder not engaged in such business.

(2) Any such firm, corporation, group, or association engaged in any such business in advertising goods, property, or service for sale shall affirmatively and unmistakably indicate and state that the seller is a business concern and not a private party.

(d)(1) Any person, firm, corporation, group, association, or the agent or servant of any other firm, corporation, group, or association violating any provision of this section is guilty of an unclassified misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or be imprisoned in the county jail not more than sixty (60) days, or by both fine and imprisonment.

(2) Each sale, advertisement, or representation in contravention of a provision of this section is deemed a distinct offense and subjects the offender to punishment under subdivision (d)(1) of this section.

History. Acts 1967, No. 153, §§ 1-4;
A.S.A. 1947, §§ 41-2364 — 41-2367.

RESEARCH REFERENCES

Ark. L. Rev. FTC Knights and Con- Unfair Advertising, Hammer, 32 Ark. L.
sumer Daze: The Regulation of Deceptive Rev. 446.

5-37-516 — 5-37-519. [Reserved.]

5-37-520. Misrepresentation of nature of business.

(a) It is unlawful for any person, firm, association, or corporation to misrepresent the true nature of its business by use of the words “manufacturer”, “wholesaler”, “retailer”, or a word of similar import or for any person, firm, association, or corporation to represent itself as selling at wholesale or to use the word “wholesale” in any form of sale or advertising unless the person, firm, association, or corporation is actually selling at wholesale an item advertised for the purpose of resale.

(b) As used in this section, the term “wholesale” means a sale made for the purpose of resale and not a sale made to the consuming purchaser.

(c)(1) Any person who violates any provision of this section is guilty of a violation and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) and not more than two hundred dollars (\$200).

(2) Each day’s violation constitutes a separate offense.

History. Acts 1961, No. 122, §§ 1, 3; A.S.A. 1947, §§ 41-2359, 41-2361; Acts 2005, No. 1994, § 45.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in (c).

5-37-521. Farm implements — Removal or alteration of serial number.

(a) Any person who knowingly buys, receives, disposes of, sells, offers for sale, or has in his or her possession any tractor, trailer, or other farm implement or engine removed from the tractor or farm implement from which the manufacturer’s serial or engine number or other distinguishing number or identification mark or number placed on the tractor, trailer, or farm implement or engine has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of the tractor, trailer, or farm implement or engine is guilty of a Class A misdemeanor.

(b)(1) No person with fraudulent intent shall deface, destroy, or alter the manufacturer’s serial or engine number or other distinguishing number or identification mark of a tractor, trailer, or other farm implement.

(2) No person shall place or stamp any fictitious or unauthorized serial, engine, or other number or distinguishing mark with the intention that the fictitious or unauthorized serial, engine, or other number or distinguishing mark pass for a number or mark placed on a tractor, trailer, or farm implement by the manufacturer of the tractor, trailer, or farm implement.

(3)(A) This subsection does not prohibit the restoration by an owner or repairer of an original serial, engine, or other number or distinguishing mark.

(B) However, this subsection is designed to prohibit and prevent the fraudulent removal or alteration of a mark or number placed on a tractor, trailer, or other farm implement by the manufacturer.

(c) Any person found guilty of a violation of a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1953, No. 157, §§ 1-3; A.S.A. 1947, §§ 41-2354 — 41-2356; Acts 2005, No. 1994, § 347.

Amendments. The 2005 amendment inserted “or her” in (a); and, in (c), substituted “guilty of a Class A misdemeanor”

for “punished by a fine not exceeding five hundred dollars (\$500) and, in the discretion of the jury, confinement in the county jail for a period of not exceeding six (6) months.”

5-37-522. Tobacco — Removal of serial number on container.

(a) It is unlawful for any person to remove, obliterate, or otherwise render unreadable the manufacturer's serial number or code number on any case, carton, package, or other container of any tobacco product.

(b) Any person violating a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1963, No. 251, §§ 1, 2; A.S.A. 1947, §§ 41-2362, 41-2363; Acts 2005, No. 1994, § 347.

Amendments. The 2005 amendment, in (b), inserted "Class A" and deleted "and

upon conviction shall be subject to a fine of two hundred dollars (\$200) or imprisonment for a period of not to exceed one (1) year, or both."

5-37-523. [Repealed.]

Publisher's Notes. This section, concerning packaging of strawberries, was repealed by Acts 2005, No. 1994, § 541.

The section was derived from Acts 1959, No. 240, §§ 1, 2; A.S.A. 1947, §§ 41-2357, 41-2358.

5-37-524. Fraud in the acquisition of authorization to provide motor vehicle transportation of property.

(a) It is the intent of this section to deter a person from using a telephone or another electronic means of communication to obtain authorization from any person in this state to transport the property of another person by motor vehicle, whether the property is to be transported within or without this state, and to thereafter fail to deliver the property in the manner prescribed in the contract or to appropriate the property contracted to be transported, or the proceeds from the property contracted to be transported, to the actor's own use.

(b) A person commits fraud in the acquisition of authorization to provide motor vehicle transportation of property if the person obtains authority by telephone, wire, or other electronic means from any person in this state to transport a good within or without this state and thereafter:

(1) Fails to deliver the good in the time and manner prescribed by the contract, with intent to defraud the owner or shipper of the good;

(2) Appropriates to the actor's own use the good contracted to be transported; or

(3) Appropriates to the actor's own use the proceeds from the sale, barter, or other transfer of ownership of the good contracted to be transported.

(c) Fraud in the acquisition of authorization to provide motor vehicle transportation of property is a Class D felony.

History. Acts 1983, No. 156, §§ 1, 2; A.S.A. 1947, §§ 41-2377, 41-2378.

CASE NOTES

Malicious Prosecution.

Where plaintiff was charged with violating subsection (b) of this section and later brought suit for breach of contract and malicious prosecution, summary judgment should not have been granted on the issue of malicious prosecution since reasonable minds could differ over

whether the facts presented would cause an ordinarily cautious person to believe fraud had been committed. *Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993).

Cited: *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996).

5-37-525. Defrauding a materialman.

(a) A person commits the offense of defrauding a materialman if, being the principal contractor or subcontractor, the person knowingly or wilfully with the purpose to defraud fails to pay any supplier or subcontractor for a material or good furnished to the project within thirty (30) days of final receipt of payment under the contract.

(b) Defrauding a materialman is a:

(1) Class D felony if the amount is equal to or greater than five thousand dollars (\$5,000); or

(2) Class A misdemeanor if otherwise committed.

(c) This section does not apply to a principal contractor or subcontractor covered by § 22-9-101 et seq.

(d) It is an affirmative defense to prosecution under this section that the contractor or subcontractor has given notice of a dispute in a term, condition, payment, or quality of good to the contracting consumer or to the supplier or subcontractor, or the contractor has in good faith sought relief in federal court under the bankruptcy laws of the United States, prior to the expiration of the thirty (30) days after receipt of payment under the contract.

History. Acts 1989, No. 303, § 1; 1991, No. 52, § 1.

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12 UALR L.J. 617.

Survey — Criminal Law, 14 UALR L.J. 753.

CASE NOTES

Constitutionality.

This section is unconstitutional in that it violates Ark. Const., Art. 2, § 16, prohibiting imprisonment for debt. *State v.*

Riggs, 305 Ark. 217, 807 S.W.2d 32 (1991) (decided under law prior to 1991 amendment).

CHAPTER 38

DAMAGE OR DESTRUCTION OF PROPERTY

SUBCHAPTER.

1. GENERAL PROVISIONS.

SUBCHAPTER.

2. OFFENSES GENERALLY.
3. ARSON AND OTHER BURNING.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law:
Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-38-101. Definitions.

Effective Dates. Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of

the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-38-101. Definitions.

As used in this chapter:

(1) "Catastrophe" means:

(A) Serious physical injury or death to five (5) or more persons; or

(B) Substantial damage to five (5) or more occupiable structures or property loss in excess of one-half million dollars (\$500,000);

(2)(A) "Occupiable structure" means a vehicle, building, or other structure:

(i) In which any person lives or carries on a business or other calling;

(ii) In which people assemble for a purpose of business, government, education, religion, entertainment, or public transportation; or

(iii) That is customarily used for overnight accommodation of a person, whether or not a person is actually present.

(B) "Occupiable structure" includes each unit of an occupiable structure divided into a separately occupied unit;

(3) "Property" means real property or tangible or intangible personal property, including money or any paper or document that represents or embodies anything of value;

(4) "Property of another person" means any property in which any person or government other than the actor has a possessory or proprietary interest; and

(5) "Vital public facility" means a facility maintained for use for:

(A) Public communication, transportation, or supply of water, gas, or power;

(B) Law enforcement;

(C) Fire protection;

(D) Civil or national defense; or

(E) Other public service.

History. Acts 1975, No. 280, § 1901; A.S.A. 1947, § 41-1901; Acts 2003, No. 1342, § 1.

Amendments. The 2003 amendment substituted "five (5)" for "ten (10)" twice in (5).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Arkansas Anti-Terrorism Act of 2003, 26 UALR L.J. 374.

CASE NOTES

ANALYSIS

Occupiable structure.

Vital public facility.

Occupiable Structure.

Clubhouse for a golf course is an "occu-

piable structure." *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

Vital Public Facility.

Clubhouse for a golf course is not a "vital public facility." *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

5-38-201. [Repealed.]

5-38-202. Causing a catastrophe — Threatening to cause a catastrophe.

5-38-203. Criminal mischief in the first degree.

5-38-204. Criminal mischief in the second degree.

5-38-205. Impairing the operation of a vital public facility.

5-38-206 — 5-38-209. [Reserved.]

SECTION.

5-38-210. Allowing animals into enclosures — Division fences.

5-38-211. Seed horse, unaltered mule, or jack running at large.

5-38-212. Destruction of native growth.

5-38-213. [Repealed.]

5-38-214. Willful removal or destruction of landmarks established by legal survey.

5-38-215, 5-38-216. [Repealed.]

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Criminal trespass, § 5-39-203.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Preambles. Acts 1935, No. 159, con-

tained a preamble which read: "Whereas, holly, dogwood, pines and cedar are native Southern growth which beautify the wild woods in summer and winter; and

"Whereas, these plants are being so ruthlessly destroyed by thoughtless people that there is danger of their becoming extinct; and

“Whereas, said growth of native foliage is a great adjunct to the scenery along the highways of this state;

“Therefore ...”

Effective Dates. Acts 1883, No. 28, § 6: effective on passage.

Acts 1921, No. 82, § 7: effective on passage.

Acts 1981, No. 544, § 3: Mar. 18, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present criminal law defining the crime of arson does not include a purposeful burning of one’s own property to collect insurance proceeds; purposeful burning of one’s own property to collect insurance proceeds is determined by the General Assembly to be just as serious a crime as the purposeful burning of another’s property; and that this Act is immediately necessary to redefine the crime of arson in order to conform with the public policy of this State. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1988 (3rd Ex. Sess.), No. 13, § 3: Feb. 9, 1988. Emergency clause provided: “It is hereby found and determined by the

General Assembly that during the codification process, a mistake was made in the criminal mischief statute which should have been codified as part of the criminal mischief law and that this language needs to be added to avoid confusion as to the elements of the offense of criminal mischief. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.”

Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas’ criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

RESEARCH REFERENCES

Am. Jur. 52 Am. Jur. 2d, Mal. Misch., § 1 et seq.

C.J.S. 54 C.J.S., Mal. Misch., § 1 et seq.

5-38-201. [Repealed.]

Publisher’s Notes. This section, which provided that fines collected as a result of State Forestry Commission law enforcement activities would go to the State Forestry Fund, was repealed by Acts 2005,

No. 1994, § 515. The section was derived from Acts 1935, No. 85, § 6; Pope’s Dig., § 3054; A.S.A. 1947, § 41-1956; Acts 1997, No. 132, § 2.

5-38-202. Causing a catastrophe — Threatening to cause a catastrophe.

(a)(1) A person commits the offense of causing a catastrophe if he or she knowingly causes a catastrophe by:

- (A) Explosion;
- (B) Fire;
- (C) Flood;

(D) Avalanche;

(E) Collapse of building;

(F) Distribution of a poison, radioactive material, bacteria, or virus; or

(G) Another dangerous and difficult to confine force or substance.

(2) Causing a catastrophe is a Class Y felony.

(b)(1) A person commits the offense of threatening to cause a catastrophe if he or she:

(A) Contacts any person, company, corporation, or governmental entity; and

(B) Threatens to cause a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of a poison, radioactive material, bacteria, or virus, or another dangerous and difficult to confine force or substance, unless:

(i) Paid a sum of money or any type of property; or

(ii) The person, company, corporation, or governmental entity performs a requested act.

(2) Threatening to cause a catastrophe is a Class D felony.

(c) In addition to any other restitution ordered under § 5-4-205, a court may order that a person who violates this section make restitution to the state or any political subdivision of the state for any cleanup costs associated with the commission of the offense.

History. Acts 1975, No. 280, § 1905; 1983, No. 689, § 1; 1983, No. 815, § 1; A.S.A. 1947, § 41-1905; Acts 2003, No. 1342, § 2.

substituted "he or she knowingly causes" for "he purposely causes" in (a)(1); added (c); and made gender neutral and stylistic changes.

Amendments. The 2003 amendment

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Arkansas Anti-Terrorism Act of 2003, 26 UALR L.J. 374.

CASE NOTES

Cited: Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989).

5-38-203. Criminal mischief in the first degree.

(a) A person commits the offense of criminal mischief in the first degree if he or she purposely and without legal justification destroys or causes damage to any:

(1) Property of another; or

(2) Property, whether his or her own or property of another, for the purpose of collecting any insurance for the property.

(b) Criminal mischief in the first degree is a:

(1) Class C felony if the amount of actual damage is five hundred dollars (\$500) or more; or

(2) Class A misdemeanor if otherwise committed.

(c) In an action under this section involving cutting and removing timber from the property of another person:

(1) The following create a presumption of a purpose to commit the offense of criminal mischief in the first degree:

(A) The failure to obtain the survey as required by § 15-32-101; or

(B) The purposeful misrepresentation of the ownership or origin of the timber; and

(2)(A) There is imposed in addition to a penalty in subsection (b) of this section a fine of not more than two (2) times the value of the timber destroyed or damaged.

(B) However, in addition to subdivision (c)(2)(A) of this section, the court may require the defendant to make restitution to the owner of the timber.

History. Acts 1975, No. 280, § 1906; 1977, No. 360, § 7; 1981, No. 544, § 2; 1981, No. 671, § 1; A.S.A. 1947, § 41-1906; Acts 1988 (3rd Ex. Sess.), No. 13, § 1; 1995, No. 1296, § 5; 1997, No. 448, § 1; 2005, No. 1994, § 443.

Amendments. The 2005 amendment inserted "or she" in (a); and substituted "purpose" for "willful intent" in present (c)(1).

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CASE NOTES

ANALYSIS

Applicability.

Evidence.

Lesser-included offense.

Probable cause to arrest.

Timber.

Willful causation.

Applicability.

Former section penalizing persons who willfully cut down or destroyed trees referred to severing things attached to the freehold as part thereof, such as produce of the soil, timber, structures or fixtures and not to the tearing down of a temporary rent placard or notice. *Whipple v. Gorsuch*, 82 Ark. 252, 101 S.W. 735 (1907) (decision under prior law).

It was not necessary to show that the trespasser appropriated the timber alleged to be stolen; it was sufficient if the proof showed that he entered upon the land without lawful authority and willfully and knowingly cut down or destroyed standing or growing trees. *Smith v. State*, 127 Ark. 218, 191 S.W. 913 (1917) (decision under prior law).

The intent to convert trees cut down or destroyed to one's own use was not an element of the offense under the prior section imposing a penalty on anyone cutting or destroying trees. *Davis v. State*, 139 Ark. 175, 214 S.W. 6 (1919) (decision under prior law).

Evidence.

Evidence was sufficient to support a finding that the defendant was liable as an accomplice where she made a statement that "we got in the bad attitude mood and decided to key cars and bust plants and paint on cars," even though the only person she ever identified as keying a vehicle or damaging plants was one of her companions and she never identified the cars that were damaged or made reference to a particular vehicle.

Defendant's conviction for criminal mischief was supported by substantial evidence where the post office was unquestionably damaged as the doors and locks had been riddled with bullets and the shell casings found had been fired from a rifle that was in defendant's possession

both before and after the incident and witness testimony placed defendant inside the post office on the night the damage occurred. *McConnell v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 888 (Dec. 10, 2003).

Lesser-Included Offense.

Criminal mischief in the second degree is a lesser-included offense of criminal mischief in the first degree; the distinction between the two offenses is based upon grades of intent or degrees of culpability. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Conviction for criminal mischief in the first degree reduced to criminal mischief in the second degree after appellate review of the sufficiency of the evidence, pursuant to § 16-67-325. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Probable Cause to Arrest.

There was probable cause to arrest the defendant for criminal mischief where the defendant's brother admitted pouring formaldehyde on the victim's couch, the defendant was present at the time of the incident, and the formaldehyde belonged to the defendant. *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986).

Timber.

An indictment for cutting down trees and destroying and carrying away the timber was not defective by alleging the property as belonging to the estate of one deceased. *Boarman v. State*, 66 Ark. 65, 48 S.W. 899 (1898) (decision under prior law).

Willful Causation.

In a prosecution for criminal mischief in the first degree, it is not enough to show merely that the property was damaged or destroyed, for one essential element of this crime is that the damage was willfully caused and not accidental. *Bray v. State*, 12 Ark. App. 53, 670 S.W.2d 822 (1984).

Teenager who drove another's car without permission and accidentally totaled it was acting recklessly, but did not purposefully damage the car; as a consequence, he committed criminal mischief in the second degree rather than in the first degree. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Cited: *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982); *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985); *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

5-38-204. Criminal mischief in the second degree.

(a) A person commits criminal mischief in the second degree if the person:

(1) Recklessly destroys or damages any property of another person; or

(2) Purposely tampers with any property of another person and by the tampering causes substantial inconvenience to the owner or another person.

(b) Criminal mischief in the second degree is a:

(1) Class D felony if the amount of actual damage is two thousand five hundred dollars (\$2,500) or more;

(2) Class A misdemeanor if the amount of actual damage is one thousand dollars (\$1,000) or more but less than two thousand five hundred dollars (\$2,500); or

(3) Class B misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 1907; A.S.A. 1947, § 41-1907; Acts 1989, No. 735, § 1.

CASE NOTES

ANALYSIS

Intent.
Lesser-included offense.

Intent.
Teenager who drove another’s car without permission and accidentally totaled it was acting recklessly, but did not purposefully damage the car; as a consequence, he committed criminal mischief in the second degree rather than in the first degree. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Lesser-Included Offense.
Criminal mischief in the second degree

is a lesser-included offense of criminal mischief in the first degree; the distinction between the two offenses is based upon grades of intent or degrees of culpability. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Conviction for criminal mischief in the first degree reduced to criminal mischief in the second degree after appellate review of the sufficiency of the evidence, pursuant to § 16-67-325. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Cited: *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985).

5-38-205. Impairing the operation of a vital public facility.

(a) A person commits the offense of impairing the operation of a vital public facility if, having no reasonable ground to believe he or she has a right to do so, the person knowingly causes a substantial interruption or impairment of an operation of a vital public facility by:

- (1) Damaging the property of another person; or
- (2) Incapacitating an operator of a vital public facility.

(b) Impairing the operation of a vital public facility is a Class C felony.

History. Acts 1975, No. 280, § 1908; A.S.A. 1947, § 41-1908.

CASE NOTES

ANALYSIS

Elements.
Intent.

Elements.
To constitute the offense of impairing the operation of a vital public facility, the individual must have knowingly caused a substantial interruption or impairment of the operations of a vital public facility by damaging the property of another or incapacitating an operator of such a facility.

Failure to give a police officer information during arrest does not amount to this offense. *Duvall v. Sharp*, 905 F.2d 1188 (8th Cir. 1990).

Intent.
Prior section concerning injury to telegraph or telephone line meant not only a voluntary act but one done with an evil purpose. *Saint Louis, I.M. & S. Ry. v. Batesville & Winerva Tel. Co.*, 80 Ark. 499, 97 S.W. 660 (1906’) (decision under prior law).

5-38-206 — 5-38-209. [Reserved.]

5-38-210. Allowing animals into enclosures — Division fences.

(a)(1)(A) Any person who willfully, directly, or indirectly turns loose any horse, mule, hog, sheep, goat, domesticated cattle, or any other animal or so allow any such animal to be turned loose in any

enclosure where crops of any kind are growing or have been cultivated and not gathered without the consent of all persons or their agents owning and cultivating the crops is guilty of a violation and upon conviction shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100).

(B) This section shall not be enforced for a trespass occurring after the close of the year in which the crop has been grown.

(2) Willfully leaving open a gate or a gap in a fence in such manner that an animal will or can enter such cultivated land when the crop is not gathered and in the year in which the crop is grown is a violation of this section and shall be punished as provided in this section.

(b)(1) When different owners or their tenants have cultivated under a common enclosure for one (1) or more years and anyone owning only a part of the land desires to avoid the penalties of this section and will put up half of a division fence by March 1 in any year and give notice in writing before January 1 preceding March 1 to the owner of the balance of the field, notifying him or her to put up the balance of the division fence, and the owner so notified fails to enclose his or her land by putting up the balance of the division fence or a fence entirely his or her own before April 1 following such notice, the person giving the notice is not liable to a penalty provided in this section for trespass that may occur on the land of the owner so notified.

(2) When a division fence is put up under a provision of this section or has existed for one (1) year or more by common consent of adjacent owners of land, no person shall break or remove the division fence or any part of the division fence without giving at least nine (9) months' notice of the intention to do so to the owner or agent of the adjoining land enclosed by the division fence, and if done without the notice, the offender shall be punished as provided in this section.

(c) It is not the purpose of this section to repeal or modify any law of enclosure now existing nor a remedy in the law of enclosure now existing nor to affect or repeal any animal statute or law nor a penalty in the animal statute or law.

History. Acts 1883, No. 28, §§ 1-5, p. 50; C. & M. Dig., §§ 2533-2537; Pope's Dig., §§ 3182-3186; A.S.A. 1947, §§ 41-1966 — 41-1970; Acts 2005, No. 1994, § 46.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in (a)(1); and inserted "or her" three times in (b)(1).

CASE NOTES

Civil Liability.

On the failure of an adjoining landowner to maintain his half of a division fence, he became liable to the adjoining

proprietor for damages sustained by the latter to his stock by reason thereof. *Primrose v. Brown*, 173 Ark. 632, 292 S.W. 1003 (1927).

5-38-211. Seed horse, unaltered mule, or jack running at large.

(a) If any seed horse or any unaltered mule or jack, over the age of two (2) years, is found running at large, the owner shall be fined, for the first offense, three dollars (\$3.00), and for every subsequent offense, not exceeding ten dollars (\$10.00), to be recovered by action in the name of any person who shall sue:

(1) One-half ($\frac{1}{2}$) to his or her own use; and

(2) The other one-half ($\frac{1}{2}$) to the county's.

(b) The action may be prosecuted before any justice of the peace of the county where the offense is committed, and the owner is also liable for any damage that may be sustained by the running at large of the seed horse, jack, or mule, to be recovered by an action before any court having jurisdiction over the action.

History. Rev. Stat., ch. 74, § 1; C. & M. § 1, is also codified as § 2-38-201 [repealed], § 344; A.S.A. 1947, § 78-1136.

Publisher's Notes. Rev. Stat., ch. 74,

5-38-212. Destruction of native growth.

(a) The wanton and willful destruction of holly or a dogwood, pine, cedar, or other native southern growth is prohibited.

(b) The cutting or destruction of holly or a dogwood, pine, cedar, or other native southern growth within a distance of fifty yards (50 yds.) of either side of a highway of this state is prohibited except by the owner of the land upon which the growth is found or upon the consent of the owner.

(c) This section shall not be construed to prevent an owner of real property from clearing his or her land of growth described in subsections (a) and (b) of this section or from cutting and marketing a pine, cedar, or other timber on his or her land.

(d) Any person violating a provision of this section is guilty of a violation and shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

History. Acts 1935, No. 159, §§ 1-4; Pope's Dig., §§ 3199-3201; A.S.A. 1947, §§ 41-1971 — 41-1974; Acts 2005, No. 1994, § 47.

Amendments. The 2005 amendment substituted "guilty of a violation" for "deemed guilty of a misdemeanor" in (d).

5-38-213. [Repealed.]

Publisher's Notes. This section, concerning sowing Johnson grass on land of another, was repealed by Acts 2005, No. 1994, § 516. The section was derived from

Acts 1937, No. 254, §§ 1, 2; Pope's Dig., §§ 3208, 3209; A.S.A. 1947, §§ 41-1964, 41-1965.

5-38-214. Willful removal or destruction of landmarks established by legal survey.

(a) Any person who willfully cuts down, destroys, defaces, removes, or carries off any witness tree, monument, or other landmark established by legal survey and used to delineate a boundary line is guilty of a Class A misdemeanor.

(b) Furthermore, in any civil suit involving damages to property arising from the removal or destruction of a marker established by a legal survey, the complaining party is entitled to recover three (3) times the damages.

History. Acts 1963, No. 247, § 1; 1977, No. 807, § 7; A.S.A. 1947, § 41-1976; Acts 2005, No. 1994, § 348.

Amendments. The 2005 amendment, in (a), substituted "guilty of a Class A misdemeanor" for "deemed guilty of a misdemeanor" and deleted "and upon conviction shall be fined in any sum not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for a period of not less than thirty (30) days, or by both fine and imprisonment" from the end.

tion shall be fined in any sum not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for a period of not less than thirty (30) days, or by both fine and imprisonment" from the end.

5-38-215, 5-38-216. [Repealed.]

Publisher's Notes. These sections, concerning destruction of section corners and landmarks, were repealed by Acts 2005, No. 1994, § 517. The sections were derived from the following sources:

5-38-215. Acts 1921, No. 82, § 6; Pope's Dig., § 3224; A.S.A. 1947, § 41-1977.

5-38-216. Rev. Stat., ch. 44, div. 4, art. 9, § 5; C. & M. Dig., § 2541; Pope's Dig., § 3188; A.S.A. 1947, § 41-1975.

SUBCHAPTER 3 — ARSON AND OTHER BURNING

SECTION.

5-38-301. Arson.

5-38-302. Reckless burning.

5-38-303. Failure to control or report a dangerous fire.

5-38-304 — 5-38-309. [Reserved.]

SECTION.

5-38-310. Unlawful burning — Miscellaneous misdemeanors.

5-38-311. Unlawful burning — Miscellaneous felonies.

Cross References. Anti-arson information from insurance applicants, § 23-88-201 et seq.

Criminal possession of explosives, § 5-73-108.

Fines, § 5-4-201.

Open air fires, § 20-22-301 et seq.

State police acting as fire marshal, duty to investigate arson, § 12-8-106.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1981, No. 845, § 8; Mar. 28, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the penalties now prescribed by law for arson of forests and non-forest watershed lands are inadequate to deter such arson; that

this Act is designed to increase the penalties for such offenses and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 544, § 3; Mar. 18, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present criminal law defining the crime of arson does not include a purposeful burning of one's own property to collect insurance proceeds; purposeful burning of one's own property to collect insurance proceeds is determined

by the General Assembly to be just as serious a crime as the purposeful burning of another's property; and that this Act is immediately necessary to redefine the crime of arson in order to conform with the public policy of this State. Therefore,

an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. "Burning;" what constitutes to justify charge of arson. 28 ALR 4th 482.

C.J.S. 6A C.J.S., Arson, § 1 et seq.

Am. Jur. 5 Am. Jur. 2d, Arson, § 1 et seq.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

5-38-301. Arson.

(a) A person commits arson if he or she:

(1) Starts a fire or causes an explosion with the purpose of destroying or otherwise damaging:

(A) An occupiable structure or motor vehicle that is the property of another person;

(B) Any property, whether his or her own or property of another person, for the purpose of collecting any insurance for the property;

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

(D) A vital public facility;

(E) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(F) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state; or

(2) Recklessly causes a fire or an explosion in the course of and in furtherance of a felony or in immediate flight after committing a felony that results in destroying or otherwise damaging:

(A) Any occupiable structure or motor vehicle;

(B) Any property, if the fire or explosion creates a risk of death or serious physical injury to any person;

(C) A vital public facility;

(D) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(E) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state.

(b) Arson is a:

(1) Class A misdemeanor if the property sustains less than five hundred dollars (\$500) worth of damage;

(2) Class D felony if the property sustains at least five hundred dollars (\$500) but less than two thousand five hundred dollars (\$2,500) worth of damage;

(3) Class C felony if the property sustains at least two thousand five hundred dollars (\$2,500) but less than five thousand dollars (\$5,000) worth of damage;

(4) Class B felony if the property sustains at least five thousand dollars (\$5,000) but less than fifteen thousand dollars (\$15,000) worth of damage;

(5) Class A felony if the property sustains at least fifteen thousand dollars (\$15,000) but less than one hundred thousand dollars (\$100,000) worth of damage; or

(6) Class Y felony if the property sustains damage in an amount of at least one hundred thousand dollars (\$100,000).

(c) As used in this section, "motor vehicle" means every self-propelled device in, upon, or by which any person or property is, or may be, transported or drawn upon a street or highway.

(d)(1)(A) If the Governor deems it necessary, he or she may offer a reward not to exceed fifty thousand dollars (\$50,000) for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section.

(B) The fifty-thousand-dollar reward maximum imposed by this section only applies to state-appropriated funds.

(C) The Governor may increase the amount of any reward offered by use of funds from the Reward Pool Fund created in this section.

(2) When the Governor offers a reward pursuant to this section, he or she may place any reasonable condition upon collection of the reward as he or she deems necessary.

(3)(A) The Governor may establish and administer a "Reward Pool Fund".

(B) Any monetary donation or gift made by a private citizen or corporation for the purpose of offering a reward or enhancing a state-funded reward offered for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section shall be deposited in the fund.

(C)(i) The Governor shall have the sole discretion to determine if and how much of the fund is offered in a particular criminal case.

(ii) However, if the donor places any lawful restriction or instruction on use of the donation at the time it is given, the restriction or instruction shall be honored.

(4) Any person completing the requirements to be eligible for the reward is entitled to the reward offered by the Governor, and the Governor shall certify the amount of the reward to the Auditor of State, who shall issue his or her warrant on the State Treasury for the reward, to be paid out of any money appropriated or deposited into the fund.

History. Acts 1975, No. 280, § 1902; 299, § 1; 1997, No. 921, § 1; 2005, No. 1981, No. 544, § 1; A.S.A. 1947, § 41-1529, § 1.

Amendments. The 2005 amendment

inserted the present subdivision (1) designation in (a); redesignated former (a)(1)-(6) as present (a)(1)(A)-(F); inserted "or

she" in (a); inserted "or her" in present (a)(1)(B) and (C); and added present (a)(2) and made related changes.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 14
UALR L.J. 753.

CASE NOTES

ANALYSIS

Accomplice or accessory.
Damage.
Double jeopardy.
Elements.
Evidence.
Indictment or information.
Instructions.
Intent.
Lesser included offense.
Occupiable structure.
Separate offenses.
Vital public facility.

Accomplice or Accessory.

Former section defining arson did not abolish the common-law distinction between a principal and an accessory before the fact so that one who directed another to burn a certain building but was not present when his order was carried out could not be convicted as a principal. *Fisher v. State*, 162 Ark. 183, 257 S.W. 734 (1924) (decision under prior law).

Refusal to submit to the jury in an arson trial the question of whether state's witnesses were accomplices held error. *Satterfield v. State*, 245 Ark. 337, 432 S.W.2d 472 (1968) (decision under prior law).

Damage.

It was not necessary to constitute arson that any part of the house should be wholly consumed. *Mary v. State*, 24 Ark. 44 (1862); *State v. Snellgrove*, 71 Ark. 101, 71 S.W. 266 (1902) (preceding decisions under prior law).

To support a charge of arson it was not necessary that the building alleged to have been burned should have been burned down; it was sufficient that it be damaged by the fire. *Bennett v. State*, 201 Ark. 237, 144 S.W.2d 476 (1940) (decision under prior law).

Double Jeopardy.

Defendant was properly convicted of capital murder and arson after he told a

neighbor that his trailer home exploded while his girlfriend was inside; the constitutional prohibition against double jeopardy was not violated because § 5-1-110(d)(1)(A) permitted a sentence for both crimes. *Meadows v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 492 (Sept. 16, 2004).

Elements.

Arson is not an "element included of offense" of conspiracy to commit theft by deception. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

In order to overcome the common law presumption against arson, the state must prove not only the burning of building, but also that it was burned by the willful act of some person criminally responsible for his acts, and not by natural or accidental causes. *Allen v. State*, 40 Ark. App. 158, 842 S.W.2d 468 (1992).

Evidence.

In a prosecution for destroying a building by means of dynamite, evidence concerning the extent of the injury to the building was admissible. *Spurgeon v. State*, 160 Ark. 112, 254 S.W. 376 (1923) (decision under prior law).

Evidence held sufficient to sustain the conviction. *Monts v. State*, 233 Ark. 816, 349 S.W.2d 350 (1961) (decision under prior law); *Riddick v. State*, 271 Ark. 203, 607 S.W.2d 671 (1980).

There is a common law presumption against arson in the instance of an unexplained fire, and evidence must be of a "substantial character" to rebut this presumption. *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

Evidence presented by the state was sufficient to overcome the common law presumption against arson, and the trial court did not err in denying defendant's

motion for a directed verdict. *Allen v. State*, 40 Ark. App. 158, 842 S.W.2d 468 (1992).

Circumstantial evidence of burglary and arson held sufficient to support conviction. *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994).

Evidence was sufficient for conviction of arson where defendant stated that the victim's body was placed on a wood burning stove where investigator's stated the fire had started, defendant admitted that he had kicked the pipe off of the stove, and the value of the destroyed trailer and its contents was between \$20,000 and \$25,000. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

Where witness testified that (1) he was in victim's home the day of the murder, (2) defendant arrived with a folding knife and entered victim's bedroom, (3) the victim screamed, (4) defendant's husband stated that defendant had killed the victim, and (5) the witness saw the husband take a can of kerosene from the front porch, there was substantial evidence in support of the jury's conviction of defendant for capital murder and arson. *Meadows v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 767 (Dec. 9, 2004).

There was sufficient evidence that the fire that destroyed two vehicles was purposely set by a person, and that defendant was that person, where witnesses testified that the fire was more than likely started with gasoline or some other equivalent accelerant and there was evidence that defendant had made threatening statements to burn the victim's belongings. *Lowry v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 625 (Oct. 20, 2005).

Indictment or Information.

Information charging defendants with burning a drug store and the building in which the business was carried on was not bad for duplicity. *Bennett v. State*, 201 Ark. 237, 144 S.W.2d 476 (1940) (decision under prior law).

Instructions.

Where there was no evidence upon which defendant could have been found guilty of criminal mischief rather than arson, and he either damaged an occupiable structure or he damaged no structure, there was no basis for his request for an

instruction on conspiracy to commit criminal mischief instead of an instruction on conspiracy to commit arson. *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982).

Intent.

The offense was committed where one burned his own house maliciously in the sense of an intention, with bad motive, of violating the law. *Turner v. State*, 155 Ark. 443, 244 S.W. 727 (1922) (decision under prior law).

The intention and design of the party were best explained by a complete view of every part of his conduct at the time, and not merely from the proof of a single and isolated act or declaration, so where several felonies were connected together, and formed part of one entire transaction, then one was evidence to prove the character of the other. *Perry v. State*, 232 Ark. 959, 342 S.W.2d 95 (1961) (decision under prior law).

Testimony as to other dynamitings planned for the same night was clearly admissible to show the scheme, pattern and intent of defendant in the dynamiting of building for which he was being tried. *Lauderdale v. State*, 233 Ark. 96, 343 S.W.2d 422 (1961) (decision under prior law).

Circumstantial evidence held sufficient for the injury to conclude that defendant intentionally started the fire. *Parris v. State*, 270 Ark. App. 269, 604 S.W.2d 582 (Ct. App. 1980).

Defendant, as an accomplice to arson, did not have to have a "conscious object" to commit arson. *Reed v. State*, 326 Ark. 27, 929 S.W.2d 703 (1996).

Lesser Included Offense.

Arson is not a lesser offense included within conspiracy to commit theft by deception. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Occupiable Structure.

Clubhouse for a golf course is an "occupiable structure." *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

Separate Offenses.

Counts charging arson and burglary are two independent charges and a verdict in one would not be res judicata as to the other, even though based upon the same evidence, so consistency in the verdicts is

unnecessary; accordingly, defendant could be acquitted of burglary and convicted of arson. *Riddick v. State*, 271 Ark. 203, 607 S.W.2d 671 (1980).

Vital Public Facility.

Clubhouse for a golf course is not a

“vital public facility.” *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

Cited: *Ginter v. Stallcup*, 869 F.2d 384 (8th Cir. 1989); *McNeese v. State*, 326 Ark. 787, 935 S.W.2d 246 (1996).

5-38-302. Reckless burning.

(a) A person commits the offense of reckless burning if the person purposely starts a fire or causes an explosion, whether on his or her own property or property of another person, and thereby recklessly:

(1) Creates a substantial risk of death or serious physical injury to any person;

(2) Destroys or causes substantial damage to an occupiable structure of another person; or

(3) Destroys or causes substantial damage to a vital public facility.

(b) Reckless burning is a Class D felony.

History. Acts 1975, No. 280, § 1903; A.S.A. 1947, § 41-1903.

CASE NOTES

Cited: *Ginter v. Stallcup*, 869 F.2d 384 (8th Cir. 1989).

5-38-303. Failure to control or report a dangerous fire.

(a) A person commits the offense of failure to control or report a dangerous fire if the person knows that a fire is unattended and is endangering the life, physical safety, or a substantial amount of property of another person, and the person:

(1) Fails to act in a reasonable manner to put out or control the fire when he or she can do so without substantial risk to himself or herself; or

(2) Fails to act in a reasonable manner to report the fire.

(b) Failure to control or report a dangerous fire is a Class B misdemeanor.

History. Acts 1975, No. 280, § 1904; A.S.A. 1947, § 41-1904.

5-38-304 — 5-38-309. [Reserved.]

5-38-310. Unlawful burning — Miscellaneous misdemeanors.

(a) The following acts are Class A misdemeanors:

(1) Setting on fire or causing or procuring to be set on fire any forest, brush, or other inflammable vegetation on another person's land;

(2) Allowing fire to escape from the control of the person building the fire or having charge of the fire or to spread to any person's land other than the builder of the fire;

(3)(A) Burning any brush, stumps, logs, rubbish, fallen timber, grass, stubble, or debris of any sort, whether on the person's own land or another person's land, without taking necessary precaution both before lighting the fire and at any time after lighting the fire to prevent the escape of the fire.

(B) The escape of fire to adjoining timber, brush, or grassland is prima facie evidence that a necessary precaution was not taken;

(4) Building a camp fire on another person's land, without cleaning the ground immediately around it free from material that will carry fire or leaving on another person's land a camp fire to spread on that other person's land or by throwing away a lighted cigar, match, or cigarette or by the use of a firearm or in any other manner starting a fire in forest material not the person's own and leaving the fire unextinguished;

(5) Defacing or destroying a fire warning notice; and

(6) Failure by any employee of the Arkansas Forestry Commission or any officer charged with a duty of enforcing a criminal law to attempt to secure the arrest and conviction of any person against whom he or she has or can secure evidence of violating a fire law.

(b) No bond for costs shall be required in any court of this state for prosecution for violation of a provision of this section.

History. Acts 1935, No. 85, §§ 1, 8; Pope's Dig., §§ 3049, 3056; Acts 1981, No. 845, §§ 1, 2; A.S.A. 1947, §§ 41-1951, 41-1958; Acts 1993, No. 521, § 4; 2005, No. 1994, § 349.

Publisher's Notes. Acts 1935, No. 85, § 8, is also codified as §§ 5-38-311(b) and 20-22-305.

Amendments. The 2005 amendment, in (a), inserted "Class A" and deleted "and

shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than three hundred dollars (\$300) or a jail sentence of not more than one (1) year, or both fine and imprisonment" from the end; inserted "or her" in (a)(1) and (a)(3); inserted "or she" in (a)(6); and deleted previously repealed (7); and made related changes.

CASE NOTES

ANALYSIS

Construction.
Civil liability.
Instructions.
Presumption.

Construction.

The provision of subdivision (a)(3) that the escape of fire to adjoining lands shall be prima facie evidence that necessary precautions were not taken is penal in nature and to be strictly construed. *Thomas v. Raney*, 233 Ark. 836, 349 S.W.2d 129 (1961).

Civil Liability.

Where the same fire which is the basis

for a criminal conviction is the basis for a later suit for civil damages, such conviction is admissible in civil actions not only in behalf of the prosecuting witness in the criminal case but also in behalf of "any other person" suffering damages from the fire. *Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963).

Instructions.

Where defendant was charged in information with allowing fire to escape from his control and to spread to the lands of persons other than builder of the fire as set out in subdivision (a)(2) but instruction to the jury authorized jury to return

verdict of guilty of violation of subdivision (a)(3), the wording of subdivision (a)(3) was sufficient to charge defendant with doing the act that state's evidence showed him to be guilty of, to the satisfaction of the jury. *Cecil v. State*, 234 Ark. 129, 350 S.W.2d 614 (1961).

sents a jury question, the statutory presumption of negligence in subdivision (a)(3) passes out of the picture. *Thomas v. Raney*, 233 Ark. 836, 349 S.W.2d 129 (1961); *Whiteside v. Tyner*, 238 Ark. 985, 386 S.W.2d 239 (1965).

Presumption.

Where testimony on negligence pre-

5-38-311. Unlawful burning — Miscellaneous felonies.

(a) The following acts are Class C felonies:

(1) Purposely setting on fire the land of another person;

(2) Starting a fire on the person's own land that he or she has leased or are under his or her control with the intent of letting the fire escape to the land of another person; and

(3) The destruction or injuring of, or theft of, any telephone line, tower, building, tool, or equipment used in the detection, reporting, or suppression of fires.

(b) No bond for costs shall be required in any court of this state for prosecution for violation of a provision of this section.

History. Acts 1935, No. 85, §§ 2, 8; Pope's Dig., §§ 3050, 3056; Acts 1979, No. 225, § 1; 1981, No. 845, § 3; A.S.A. 1947, §§ 41-1952, 41-1958; Acts 2005, No. 1994, § 416.

Publisher's Notes. Acts 1935, No. 85, § 8 is also codified as §§ 5-38-310(b) and 20-22-305.

Acts 1979, No. 225, § 3, provided that the act would not affect rights or duties matured, liabilities or penalties that were incurred, or proceedings begun before its effective date.

Amendments. The 2005 amendment, in (a), inserted "Class C" and deleted "and shall be punishable by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000) or less than one (1) year in the penitentiary nor more than ten (10) years, or both fine and imprisonment" from the end; deleted "or willfully or maliciously" following "Purposely" in (a)(1); and inserted "or she" in (a)(2).

CHAPTER 39

BURGLARY, TRESPASS, AND OTHER INTRUSIONS

SUBCHAPTER

1. GENERAL PROVISIONS.
2. OFFENSES GENERALLY.
3. OFFENSES INVOLVING POSTED AND ENCLOSED LAND.
4. OFFENSES INVOLVING CEMETERY OR GRAVE MARKERS.

A.C.R.C. Notes. References in "this chapter" in subchapters 1 and 2, and §§ 5-39-301 — 5-39-304 may not apply to § 5-

39-305 and subchapter 4 which were enacted subsequently.

RESEARCH REFERENCES

ALR. Entry on private lands in pursuit of wounded game as criminal trespass. 41 ALR 4th 805.

Am. Jur. 13 Am. Jur. 2d, Burglary, § 1 et seq.

75 Am. Jur. 2d Trespass, § 162 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

C.J.S. 12A C.J.S., Burglary, § 1 et seq.
87 C.J.S., Trespass, § 140 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 172.

Legislative Survey, Criminal Law, 16 UALR L.J. 91.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-39-101. Definitions.

5-39-101. Definitions.

As used in this chapter:

(1) "Commercial occupiable structure" means a vehicle, building, or other structure in which:

(A) Any person carries on a business or other calling; or

(B) People assemble for a purpose of business, government, education, religion, entertainment, or public transportation;

(2)(A) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises.

(B)(i) A person who enters or remains in or upon premises that are at the time open to the public does so with license and privilege, regardless of his or her purpose, unless he or she defies a lawful order not to enter or remain on the premises personally communicated to the person by the owner of the premises or another person authorized by the owner.

(ii) A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public.

(C) A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude an intruder does so with license and privilege unless:

(i) Notice not to enter or remain is personally communicated to the person by the owner or a person authorized by the owner; or

(ii) Notice is given by posting in a conspicuous manner;

(3) "Premises" means an occupiable structure and any real property;

(4)(A) "Residential occupiable structure" means a vehicle, building, or other structure:

(i) In which any person lives; or

(ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.

(B) "Residential occupiable structure" includes each unit of a residential occupiable structure divided into a separately occupied unit; and

(5) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 2001; A.S.A. 1947, § 41-2001; Acts 1993, No. 442, § 1; 1993, No. 552, § 1.

CASE NOTES

ANALYSIS

Enter and remain unlawfully.
Occupiable structure.

Enter and Remain Unlawfully.

Defendant held not to have privilege or license under subdivision (3) (now subdivision (4) of this section), to enter a room since it was closed and marked for employees only. *Sims v. State*, 272 Ark. 308, 613 S.W.2d 820 (1981).

Where the evidence showed that the defendant attacked the victim and looked for her purse while she was on the porch of her home and escaped by running through the house and a rear window, the state failed to prove the charge of burglary, as the state did not prove an unlawful entry upon the victim's front porch, for subdivision (3) (now subdivision (4) of this section) permits an entry upon premises that are open to the public, and there was no proof that the defendant entered the house for the purpose of committing an offense in the course of his efforts to escape apprehension. *Campbell v. State*, 289 Ark. 454, 712 S.W.2d 302 (1986).

Occupiable Structure.

The student union building at a univer-

sity is an "occupiable structure" under the statutory definition inasmuch as the determinative factor is the nature of the premise — not whether it was occupied at the time of the crime, but rather whether it was occupiable — and a building used for social activities, religious sessions, and classroom meetings is clearly an "occupiable structure." *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977).

A building where people assemble for purposes of education is an occupiable structure regardless of whether it was occupied at the time of the crime. *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850, rev'd on other grounds, 286 Ark. 198, 691 S.W.2d 842 (1985).

A supply room, attached to a main warehouse, was an occupiable structure in that it was functionally interconnected with, and immediately contiguous to, the main structure in which the victim carried on its business. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

Cited: *Hill v. State*, 261 Ark. 711, 551 S.W.2d 200 (1977); *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978); *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986); *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987).

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-39-201. Residential burglary — Commercial burglary.
- 5-39-202. Breaking or entering.
- 5-39-203. Criminal trespass.
- 5-39-204 — 5-39-209. [Reserved.]
- 5-39-210. Forcible possession of land.
- 5-39-211. Cemeteries — Mining and other unlawful entries.

SECTION.

- 5-39-212. Cemeteries — Access — Debris — Disturbance.
- 5-39-213. Advertising on property without owner's written permission.
- 5-39-214. Unauthorized entry of a school bus — Posting of warning on a school bus.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Criminal mischief, §§ 5-38-203, 5-38-204.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Use of physical force in defense of property, § 5-2-608.

Effective Dates. Acts 1907, No. 58, § 4: effective on passage.

Acts 1955, No. 108, § 4: Feb. 24, 1955. Emergency clause provided: "It is hereby found and declared by the General Assem-

bly of the State of Arkansas that it is essential to the public peace, health, safety, and welfare that cemeteries be accessible by automobile and that such cemeteries be neat in appearance, that in fact all access to some cemeteries within this state has been cut off by fences, and that some cemeteries within this state are very unsightly, therefore, an emergency is hereby declared to exist and this act being necessary to protect the public peace, health, safety and welfare shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Absence of occupant from residential structure affecting nature of offense as burglary or breaking and entering. 20 ALR 4th 349.

UALR L.J. Survey, Criminal Law, 13 UALR L.J. 341.

5-39-201. Residential burglary — Commercial burglary.

(a)(1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment.

(2) Residential burglary is a Class B felony.

(b)(1) A person commits commercial burglary if he or she enters or remains unlawfully in a commercial occupiable structure of another person with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment.

(2) Commercial burglary is a Class C felony.

History. Acts 1975, No. 280, § 2002; A.S.A. 1947, § 41-2002; Acts 1993, No. 442, § 2; 1993, No. 552, § 2.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey, Hall, Evidence, 8 UALR L.J. 157.

Survey — Criminal Law, 11 UALR L.J. 175.

CASE NOTES

ANALYSIS

Assistance of counsel.
Considered as aggravating factor.
Defense.
Due process.
Elements of offense.
Entry.

Evidence.
Indictment or information.
Instructions.
Intent.
Lesser included offenses.
Occupiable structure.
Ownership.

Possession of stolen property.

Proof.

Separate offenses.

Structure.

Assistance of Counsel.

Where, on the morning of the trial, the defendant's request for a change of counsel and a continuance was refused, the defendant was denied his right to counsel, as it was apparent that the defendant honestly believed, correctly or not, that his attorney was not looking out for his best interests. *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986), overruled on other grounds by *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989), overruled on other grounds, *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

The defendant did not waive his right to an attorney, because the trial judge's statement that the defendant would have to accept the consequences of representing himself did not constitute adequate warning, and the defendant did not express a clear intent to waive his right to counsel. *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986), overruled on other grounds by *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989), overruled on other grounds, *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Considered as Aggravating Factor.

Burglary could not be considered, absent supporting proof, as a felony creating the substantial risk of death or serious physical injury to another person under § 5-4-604(3), since a burglary as defined by this section could be committed by an unlawful entry into a vacant house with no possibility of violence or injury to anyone. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), cert. denied, 459 U.S. 1042, 103 S. Ct. 460, 74 L. Ed. 2d 611 (1982).

Defense.

Voluntary intoxication is an affirmative defense to a crime that requires a purposeful intent; accordingly, where there was evidence presented in a burglary prosecution that the defendant had been drinking heavily for hours just prior to the crime, the trial court should have given an instruction on the lesser included offense of criminal trespass. *Brown v. State*, 12 Ark. App. 132, 671 S.W.2d 228 (1984).

Due Process.

District court's grant of writ of habeas corpus on the ground that the trial court's refusal to allow defendant to inform the jury of his prior acquittal on possession charges rendered his trial fundamentally unfair. *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), cert. denied, 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993).

Elements of Offense.

Both entry into a building and specific criminal intent are essential elements of the crime of burglary. *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988).

Defendant claimed that the trial court's description of commercial burglary was so technical that it did not provide defendant with adequate notice of the charges against him and rendered his plea involuntary; however, the judge's use of the terms "enter" and "intent" conveyed the essential elements of the burglary. *Easter v. Norris*, 100 F.3d 523 (8th Cir. 1996), cert. denied, 520 U.S. 1148, 117 S. Ct. 1322, 137 L. Ed. 2d 484 (1997).

Entry.

Crime of burglary was committed though defendant was interrupted after the breaking, but before entry. *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949) (decision under prior law).

Both a breaking and entry need not have been shown to convict defendant of burglary since either was sufficient to constitute the crime. *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469 (1972) (decision under prior law).

Where defendant broke the glass in the door and stuck his hand through, the intrusion was sufficient even though the defendant could not get the door open. *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469 (1972) (decision under prior law).

Either the separate act of breaking or the separate act of entering either in the daytime or nighttime constituted the crime of burglary. *Albright v. State*, 253 Ark. 671, 488 S.W.2d 11 (1972) (decision under prior law).

Entry into a building is an essential element of the crime of burglary. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978).

Where defendant entered closed door which had "employees only" sign on it, defendant did not have privilege or license

under § 5-39-101(3) (now § 5-39-101(4)), to enter the room since it was closed and marked for employees only. *Sims v. State*, 272 Ark. 308, 613 S.W.2d 820 (1981).

The defendant's license or privilege to go into one section of the courthouse for the purpose of retrieving his tools did not authorize him to go into other unauthorized areas for the purpose of committing theft. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Where the evidence showed that the defendant attacked the victim and looked for her purse while she was on the porch of her home and escaped by running through the house and a rear window, the state failed to prove the charge of burglary, as the state did not prove an unlawful entry upon the victim's front porch, for of § 5-39-101(3) (now § 5-39-101(4)), permits an entry upon premises that are open to the public, and there was no proof that the defendant entered the house for the purpose of committing an offense in the course of his efforts to escape apprehension. *Campbell v. State*, 289 Ark. 454, 712 S.W.2d 302 (1986).

Evidence.

Evidence held insufficient to sustain a conviction. *Minter v. State*, 71 Ark. 178, 71 S.W. 944 (1903); *Gunter v. State*, 79 Ark. 432, 96 S.W. 181 (1906); *Anderson v. State*, 84 Ark. 54, 104 S.W. 1096 (1907) (preceding decisions under prior law); *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980); *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984); *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988); *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992).

Evidence held sufficient to support conviction. *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949); *Clay v. State*, 236 Ark. 398, 366 S.W.2d 299 (1963); *Williams v. State*, 239 Ark. 686, 393 S.W.2d 618 (1965); *Johnson v. State*, 252 Ark. 50, 477 S.W.2d 196 (1972); *Seals v. State*, 256 Ark. 11, 505 S.W.2d 202 (1974); *King v. State*, 256 Ark. 778, 510 S.W.2d 876 (1974); *Randle v. State*, 257 Ark. 232, 516 S.W.2d 6 (1974) (preceding decisions under prior law); *Hill v. State*, 261 Ark. 711, 551 S.W.2d 200 (1977); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977); *Boone v. State*, 264 Ark. 169, 568 S.W.2d 229 (1978); *Sims v. State*, 272 Ark. 308, 613

S.W.2d 820 (1981); *Small v. State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982); *Johnson v. State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983); *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850, rev'd on other grounds, 286 Ark. 198, 691 S.W.2d 842 (1985); *Lane v. State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986); *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986); *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Dillard v. State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987); *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988); *Johnson v. State*, 26 Ark. App. 220, 762 S.W.2d 804 (1989); *Lilly v. State*, 300 Ark. 53, 776 S.W.2d 347 (1989); *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989); *Forgy v. State*, 302 Ark. 435, 790 S.W.2d 173 (1990); *Hutcherson v. State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991); *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991); *Brown v. State*, 35 Ark. App. 156, 814 S.W.2d 918 (1991); *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992); *Franklin v. State*, 311 Ark. 601, 845 S.W.2d 525 (1993); *Turner v. State*, 64 Ark. App. 216, 984 S.W.2d 52 (1998).

Testimony held sufficient to take case to jury as to guilt of defendant. *Beasley v. State*, 219 Ark. 452, 242 S.W.2d 961 (1951) (decision under prior law).

Evidence held sufficient to sustain finding that the insureds sustained their loss as a direct result of a burglary. *Thomas Jefferson Ins. Co. v. Stuttgart Home Ctr., Inc.*, 4 Ark. App. 75, 627 S.W.2d 571 (1982).

Where state's case revealed that defendant was an accomplice in the burglary because he planned it, the trial court correctly allowed the state's witnesses to testify that defendant's role in a series of other burglaries was to plan the burglaries — not to physically enter the respective houses; the other crimes evidence also showed knowledge and lack of mistake. *Bradley v. State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983).

Where the defendant admitted that he never asked for an attorney or for the questioning to stop and was not threatened or beaten, he was read the Miranda warnings and did not appear to be under the influence of drugs or alcohol, the trial court's denial of the defendant's motion to

suppress and the introduction of the statement did not constitute error. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Although the defendant indicated that he did not want to make a statement, his statement was admissible because the police did not make any efforts to wear down his resistance nor to change his mind. *Parker v. State*, 18 Ark. App. 252, 715 S.W.2d 210 (1986), overruled on other grounds by *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989), overruled on other grounds, *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

The evidence was sufficient to support the finding that defendant took a substantial step toward committing the offense of burglary. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991).

Circumstantial evidence of an unlawful entry was sufficient. *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863, cert. denied, 504 U.S. 976, 112 S. Ct. 2948, 119 L. Ed. 2d 572 (1992).

Substantial evidence supported conviction for attempted burglary. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Admission of seized drugs in prosecution of burglary and theft was not barred by collateral estoppel because defendant's prior acquittal did not determine an ultimate fact in later prosecution of defendant. *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), cert. denied, 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993).

Insufficient evidence of burglary and theft of property was presented to corroborate the testimony of an admitted accomplice. *Gibson v. State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

The testimony of witnesses, and the fact that defendant's truck was identified as the truck carrying the same brand and size of tires that were stolen, was sufficient to support convictions for burglary and theft of property. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

Evidence of burglary held insufficient; however, the evidence was sufficient to support a finding that defendant was guilty of the lesser included offense of attempted criminal trespass. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993).

Circumstantial evidence of burglary and arson held sufficient to support con-

viction. *Armstrong v. State*, 45 Ark. App. 72, 871 S.W.2d 420 (1994).

Identification testimony and the physical evidence accidentally dropped at the scene by the defendant were admissible, and evidence was sufficient to sustain the conviction of rape, burglary, and robbery. *Monk v. State*, 320 Ark. 189, 895 S.W.2d 904 (1995).

Fingerprints and a footprint constituted substantial evidence from which the jury could find defendant committed burglary. *Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1995).

Evidence of commercial burglary held sufficient where police found defendant with a cash drawer from a store that had been broken into and cash from the drawer was in defendant's pocket. *Alexander v. State*, 55 Ark. App. 148, 934 S.W.2d 927 (1996).

Although codefendant gave varying statements about defendant's participation and the victim was unable to identify the defendant, the identification evidence held sufficient in view of the scientific evidence and the testimony of the codefendant. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998); *Atkins v. State*, 63 Ark. App. 203, 979 S.W.2d 903 (1998).

Evidence was sufficient to support the conclusion that the defendant unlawfully entered his ex-girlfriend's apartment where the apartment was leased in the ex-girlfriend's name only, the defendant was escorted away from the apartment by the police and was told not to return, the locks were changed so that the key in his possession would no longer work, and the defendant did not have permission from his ex-girlfriend to be in the apartment. *Williams v. State*, 65 Ark. App. 176, 986 S.W.2d 123 (1999).

Although there was overwhelming evidence of defendant's guilt on the residential burglary charge, there was no evidence that defendant's purpose was to commit an offense in the residence punishable by imprisonment after defendant's convictions for attempted kidnapping and attempted first-degree murder were reversed; thus, defendant's conviction for residential burglary was also reversed. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Substantial evidence existed to convict defendant of residential burglary where the jury was entitled to believe the testi-

mony of the witnesses who testified that defendant entered the house; the jury could have inferred from defendant's words and his violent manner of entry that he intended to cause bodily harm to his ex-wife. *Crowder-Jones v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 887 (Dec. 10, 2003).

Where defendant entered the victim's house uninvited, money was missing from the victim's home after defendant left, and a similar amount of money was found on defendant the same day, the evidence was sufficient to convict him of burglary. *Snyder v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 364 (May 12, 2004).

Indictment or Information.

In an indictment for burglary, the specific felony intended to be committed by the accused had to be set out or specified but the allegation of the ulterior felony intended need not be set out specifically as would be necessary in an indictment for the actual commission of that felony, and it was sufficient to state the intended offense generally. *Davis v. State*, 117 Ark. 296, 174 S.W. 567 (1915) (decision under prior law).

Upon an information for burglary and grand larceny, one could not be convicted for receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Where defendant was charged with burglary with intent to commit "a crime punishable by imprisonment," and he was tried for burglary with intent to commit attempted theft rather than for burglary with intent to commit theft, defendant's defense was prejudiced by the information's lack of specificity, and his constitutional right to notice of the charges against him violated. If the information had specified the crime defendant allegedly intended to commit — and if that crime was indeed attempted theft — then defendant would have been able to make the legal argument that there was no such thing as an intent to attempt theft. *Forgy v. Norris*, 64 F.3d 399 (8th Cir. 1995).

Instructions.

Refusal to submit defendant's proffered instructions on breaking and entering held proper. *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977).

Refusal to instruct on the lesser in-

cluded offenses of breaking and entering or criminal trespass held proper. *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978); *Robinson v. State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983).

Court held to have committed prejudicial error when it refused to give the instruction requested on the lesser included offense of criminal trespass. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

It was not prejudicial error by the court to refuse to give the proffered instruction on criminal trespass in view of appellant's admission on the stand and in his pretrial statement that he intended to go to the courthouse to steal the money before he actually got there. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Where the trial court instructed the jury on the lesser included offense of criminal trespass, but refused to give the clearly inapplicable definition of "occupiable structure", there was no error in refusing an instruction which may have misled or confused the jury. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992).

Intent.

If a man burglariously entered a house with intent to have connection with a woman while she was asleep, it was burglary. *Harvey v. State*, 53 Ark. 425, 14 S.W. 645 (1890) (decision under prior law).

In order to convict for burglary, evidence had to show that defendant entered building with intent to commit a felony. *Sanders v. State*, 198 Ark. 880, 131 S.W.2d 936 (1939) (decision under prior law).

Evidence held insufficient to show the requisite intent. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law); *Washington v. State*, 268 Ark. 1117, 599 S.W.2d 408 (Ct. App. 1980); *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980); *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982).

Evidence that defendant had previously cut a window screen in an effort to effect entry for some unknown purpose was inadmissible to show intention of defendant for the unlawful entries upon trial. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

Where the requisite intent could not be incontrovertibly established by defendant's actions in entries with which he was charged, evidence of a similar offense

was admissible to show intent. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

While it was not necessary in a prosecution to show that accused had tools with intent to commit a particular burglary, it was nevertheless proper in all cases to show felonious intent and any evidence legally bearing on felonious intent was admissible. *Randall v. State*, 239 Ark. 312, 389 S.W.2d 229 (1965) (decision under prior law).

Evidence held sufficient to show requisite intent. *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968); *Swanson v. State*, 251 Ark. 147, 471 S.W.2d 351 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1272, 31 L. Ed. 2d 465 (1972) (preceding decisions under prior law); *Parris v. State*, 270 Ark. App. 269, 604 S.W.2d 582 (Ct. App. 1980); *Johnson v. State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983); *Moore v. Lockhart*, 740 F.2d 14 (8th Cir. 1984); *Jimenez v. State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984); *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986).

Where there was sufficient evidence of the requisite intent it was reversible error to permit evidence of other burglaries to show defendant's criminal intent. *Swanson v. State*, 251 Ark. 147, 471 S.W.2d 351 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1272, 31 L. Ed. 2d 465 (1972) (decision under prior law); *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984).

To constitute the offense of burglary the accused must not only enter or remain unlawfully in an occupiable structure of another but such action must be accompanied with the purpose of committing therein an offense punishable by imprisonment, and purpose can be established by circumstantial evidence since often this is the only type of evidence available to show intent; however, the circumstances established by the evidence must be such that the requisite purpose of the accused can reasonably be inferred, and the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable conclusion. *Washington v. State*, 268 Ark. 1117, 599 S.W.2d 408 (Ct. App. 1980).

Offense of burglary was complete even though intention to commit a felony was not consummated. *Sanders v. State*, 198 Ark. 880, 131 S.W.2d 936 (1939); *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611

(1949); *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949); *King v. State*, 256 Ark. 778, 510 S.W.2d 876 (1974) (preceding decisions under prior law); *Washington v. State*, 268 Ark. 1117, 599 S.W.2d 408 (Ct. App. 1980).

The facts proven incident to an unlawful entry must show circumstances of such probative force as to reasonably warrant the inference of the purpose on the part of the accused to commit an offense punishable by imprisonment, other than the entry itself. *Washington v. State*, 268 Ark. 1117, 599 S.W.2d 408 (Ct. App. 1980).

A specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of illegal entry of an occupiable structure; the prosecution must prove each and every element of the offense of burglary beyond a reasonable doubt and cannot shift to the defendant the burden of explaining his illegal entry by merely establishing it. *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980).

In a prosecution for burglary the flight of an accused to avoid arrest is evidence of his felonious intent. *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850, rev'd on other grounds, 286 Ark. 198, 691 S.W.2d 842 (1985).

Where the defendant admitted entering the victim's home and taking the items, but testified that he entered the house through a partially opened door and had no intention of stealing anything when he entered, the jury could reasonably infer that the unlawful entry was accompanied with the intent to commit theft. *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986).

Burglary committed when defendant chased the victim into the victim's home before killing him could not serve as the underlying felony under § 5-10-101(a)(1), since the intent to kill is what made the entry into the victim's home a burglary, and the burglary was no more than one step toward the commission of the murder and was not to facilitate the murder. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Specific criminal intent and illegal entry are both elements of the crime of burglary, and existence of the intent cannot be presumed from a mere showing of the illegal entry. *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988).

Criminal intent cannot be presumed from the mere showing of illegal entry. *Rudd v. State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

In absence of evidence of other intent or explanation for breaking or entering an occupiable structure at night, the usual object or purpose of burglarizing an occupiable structure at night is theft. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Evidence of breaking into a house is not evidence of intent to commit a crime therein. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993).

There was sufficient evidence that defendant entered victim's home for the purpose of taking her property where defendant stated during a lie detector test that he went over to the victim's to burglarize the house. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

Lesser Included Offenses.

The offense of knowingly receiving stolen property was not a lesser offense of burglary. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Breaking and entering is a lesser included offense for burglary. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978).

Criminal trespass meets all of the requirements of being a lesser included offense of burglary. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

None of the crimes of rape, burglary or kidnapping is necessarily a lesser included offense of the other, since all involve separate elements, and it is not necessary to prove one offense in order to prove another. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984).

Aggravated robbery is not a lesser included offense of burglary, as aggravated robbery requires some type of serious force or threat of force used with the purpose of committing a theft, none of which is required to commit burglary, and burglary requires only that the defendant enters or remains unlawfully in an occupiable structure with the purpose of committing any offense punishable by imprisonment. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986).

A person may be convicted of the offense of breaking or entering, as a lesser offense of burglary, whether a building is "occupi-

able" or not. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987).

Occupiable Structure.

Any house came within former section defining burglary; an outhouse was not necessarily within the curtilage. *Shotwell v. State*, 43 Ark. 345 (1884) (preceding decisions under prior law).

To constitute burglary, a house or other building had to be entered. *Harvick v. State*, 49 Ark. 514, 6 S.W. 19 (1887); *Shaeffer v. State*, 61 Ark. 241, 32 S.W. 679 (1895) (preceding decisions under prior law).

The student union building at a university is an "occupiable structure." *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977).

Where the defendant entered a place of business at one time and lifted a pin from the door, then returned later, he entered an "occupiable structure." *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978).

A building where people assemble for purposes of education is an occupiable structure regardless of whether it was occupied at the time of the crime. *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850, rev'd on other grounds, 286 Ark. 198, 691 S.W.2d 842 (1985).

A building where people assembled for social activities, religious sessions, and classroom meetings has been held to be an occupiable structure regardless of whether anyone was occupying it at the time. *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988).

Although the defendant was convicted of attempted burglary, it was nevertheless necessary to prove that he attempted to enter an occupiable structure with the purpose of committing therein an offense punishable by imprisonment. *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988).

Trailer or mobile home was an occupiable structure within the meaning of this section. *Julian v. State*, 298 Ark. 302, 767 S.W.2d 300 (1989).

Just as the definition of "occupiable" does not depend on the presence of a person in a building, it does not depend on whether a building is being used for some other purpose as long as the nature of the premise is that it is occupiable. *Julian v. State*, 298 Ark. 302, 767 S.W.2d 300 (1989).

Ownership.

In prosecution for crime of burglary, it was not necessary to prove the ownership of the property burglarized. *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949) (decision under prior law).

Possession of Stolen Property.

The possession of recently stolen property is a proper circumstance to consider on the charge of burglary. *Small v. State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982).

Possession of recently stolen property is prima facie evidence of the guilt of the party in whose possession the property is found in cases of burglary, larceny and possession of stolen property, unless satisfactorily accounted for by the evidence. *Ward v. State*, 280 Ark. 353, 658 S.W.2d 379 (1983).

Possession of recently stolen property is prima facie evidence of guilt of burglary of the party in whose possession the property is found, unless it is satisfactorily accounted for to the jury. This is so even if there is no direct evidence of breaking or entering by the defendant, and, when there is no other evidence to show the defendant had committed the crimes with felonious intent. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Evidence showing defendant was in possession of recently stolen property coupled with the proof of his proximity to the scene of the crime constituted substantial evidence of burglary. *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

Proof.

In a prosecution for burglary in which it was charged that the defendant entered a building with intent to commit grand larceny, it was not necessary that the state show that the defendant stole and carried away money of the owner. *Thompson v. State*, 177 Ark. 1, 5 S.W.2d 355 (1928) (decision under prior law).

State had the burden of proving by circumstances or direct evidence that defendant made the unlawful entries charged in the information, with the specific intention of committing an assault with intent to rape. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

The prosecution bore the burden of proving, beyond a reasonable doubt, that every element of the crime charged, in-

cluding the alleged entries, were made with the specific purpose (or intent) of committing an offense punishable by imprisonment. *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), overruled on other grounds, by *White v. State*, 290 Ark. 130, 717 S.W. 784 (1986).

Separate Offenses.

Where defendant charged with both grand larceny (now theft) and burglary, was found guilty only of burglary, conviction of burglary would be affirmed, as it was not necessary for conviction of burglary that he also be found guilty of grand larceny. *Jackson v. State*, 216 Ark. 341, 225 S.W.2d 522 (1949) (decision under prior law).

Since burglary is a separate offense from theft by receiving, a defendant who had been convicted of burglary was not twice placed in jeopardy by being convicted of theft by receiving property stolen at the time of the burglary. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977).

Counts charging arson and burglary are two independent charges and a verdict in one would not be res judicata as to the other, even though based upon the same evidence, so consistency in the verdicts is unnecessary; accordingly, defendant could be acquitted of burglary and convicted of arson. *Riddick v. State*, 271 Ark. 203, 607 S.W.2d 671 (1980).

Convictions for burglary and breaking or entering were proper. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

Structure.

A fence comes within the meaning of the word "structure," as used in § 5-39-202. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992).

Cited: *Hunter v. State*, 264 Ark. 195, 570 S.W.2d 267 (1978); *White v. State*, 266 Ark. 499, 585 S.W.2d 952 (1979); *Conley v. State*, 267 Ark. 713, 590 S.W.2d 66 (Ct. App. 1979); *Elmore v. State*, 267 Ark. 952, 592 S.W.2d 124 (Ct. App. 1980); *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979); *Klimas v. Mabry*, 599 F.2d 842 (8th Cir. 1979); *Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980); *Miller v. State*, 269 Ark. 409, 601 S.W.2d 845 (1980); *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980); *Parris v. State*, 270 Ark. App. 269, 604 S.W.2d 582 (Ct. App. 1980); *Thrasher v. State*, 270 Ark. 322,

604 S.W.2d 931 (1980); *Hammon v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980); *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878 (1981); *Glasen v. State*, 272 Ark. 28, 611 S.W.2d 752 (1981); *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981); *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), cert. denied, 459 U.S. 1201, 103 S. Ct. 1185, 75 L. Ed. 2d 432 (1983); *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Pickens v. State*, 279 Ark. 457, 652 S.W.2d 626 (1983); *Brown v. State*, 12 Ark. App. 132, 671 S.W.2d 228 (1984); *Moser v. State*, 287 Ark. 105, 696 S.W.2d 744 (1985); *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985); *Harrison v. State*, 287 Ark. 102, 696 S.W.2d 501 (1985); *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988); *Smith v. Lockhart*, 882 F.2d 331

(8th Cir. 1989); *Perkins v. State*, 298 Ark. 322, 767 S.W.2d 514 (1989); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990); *Parker v. Lockhart*, 797 F. Supp. 718 (E.D. Ark. 1992); *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); *Avett v. State*, 325 Ark. 320, 928 S.W.2d 326 (1996); *Mackey v. State*, 56 Ark. App. 164, 939 S.W.2d 851 (1997); *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998); *Haynes v. State*, 354 Ark. 514, 127 S.W.3d 456 (2003), cert. denied, 541 U.S. 1047, 124 S. Ct. 2168, 158 L. Ed. 2d 740 (2004); *Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004), cert. denied, — U.S. —, 125 S. Ct. 204, 160 L. Ed. 2d 110 (2004).

5-39-202. Breaking or entering.

(a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any:

- (1) Building, structure, or vehicle;
- (2) Vault, safe, cash register, safety deposit box, or money depository;
- (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
- (4) Coin telephone or coin box;
- (5) Fare box on a bus; or
- (5) Other similar container, apparatus, or equipment.

(b) It constitutes a separate offense under this section for the breaking or entering into of each separate:

- (1) Building, structure, or vehicle;
- (2) Vault, safe, cash register, safety deposit box, or money depository;
- (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
- (4) Coin telephone or coin box;
- (5) Fare box on a bus; or
- (6) Other similar container, apparatus, or equipment.

(c) Breaking or entering is a Class D felony.

History. Acts 1975, No. 280, § 2003; A.S.A. 1947, § 41-2003; Acts 1993, No. 296, § 1.

CASE NOTES

ANALYSIS

Building or structure.
Containers.
Double jeopardy.

Enter or break.
Evidence.
Indictment or information.
Instructions.
Intent.

Lesser included offenses.
 Ownership.
 Product dispenser, etc.
 Proof.
 Separate offenses.
 Structure.
 Vehicle.

Building or Structure.

Any house came within former section defining burglary; an outhouse was not necessarily within the curtilage. *Shotwell v. State*, 43 Ark. 345 (1884) (decision under prior law).

To constitute burglary, a house or other building had to be entered. *Harvick v. State*, 49 Ark. 514, 6 S.W. 19 (1887); *Shaeffer v. State*, 61 Ark. 241, 32 S.W. 679 (1895) (preceding decisions under prior law).

An indictment for burglary of a butcher shop was sustained by proof that the house was used exclusively for the sale of meats. *Green v. State*, 56 Ark. 386, 19 S.W. 1055 (1892) (decision under prior law).

The entry of a chicken house was a violation of former section defining burglary. *Gunter v. State*, 79 Ark. 432, 96 S.W. 181 (1906) (decision under prior law).

Containers.

The language of this section neither limits its application to containers likely to contain money nor limits its application to only specific containers listed therein. *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990).

A realtor's lock box was a "container" within the scope of this section. *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990).

Double Jeopardy.

Where the charges of breaking or entering and tampering with physical evidence were based upon the same elements, i.e., defendant's breaking into a game and fish officer's vehicle to remove a box, the two felonies were merged into one, and defendant could only be convicted of one offense. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Enter or Break.

It was not necessary to prove both breaking and entering, and a breaking by physical force of an obstruction to the entering of a building, no matter how slight, was sufficient, if there was intent

to commit a felony. *Ingle v. State*, 211 Ark. 39, 198 S.W.2d 996 (1947) (decision under prior law).

Crime of burglary was committed though defendant was interrupted after the breaking, but before entry. *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949) (decision under prior law).

Where information charged defendant with unlawfully, willfully and feloniously breaking and entering a certain building, instruction telling jury to convict defendant if they found that he did enter or abet in unlawfully entering was not improper as omitting the word "break." *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949) (decision under prior law).

Evidence insufficient to find defendant guilty of breaking. *Terry v. State*, 238 Ark. 426, 382 S.W.2d 361 (1964) (decision under prior law).

Both a breaking and entry need not have been shown to convict defendant of burglary since either was sufficient to constitute the crime. *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469 (1972) (decision under prior law).

Where defendant broke the glass in the door and stuck his hand through, the intrusion was sufficient even though the defendant could not get the door open. *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469 (1972) (decision under prior law).

Either the separate act of breaking or the separate act of entering either in the daytime or nighttime constituted the crime of burglary. *Albright v. State*, 253 Ark. 671, 488 S.W.2d 11 (1972) (decision under prior law).

This section does not require that defendant enter the machine with any part of his body as opposed to just using a tool. *Smith v. State*, 47 Ark. App. 83, 884 S.W.2d 632 (1994).

This section treats an entry into any "money vending machine" as the equivalent of an entry into any building, such as a home; entry can mean "to come or go into," "to penetrate; pierce," or "to introduce; insert." *Smith v. State*, 47 Ark. App. 83, 884 S.W.2d 632 (1994).

Evidence.

Evidence held insufficient to sustain a conviction. *Minter v. State*, 71 Ark. 178, 71 S.W. 944 (1903); *Gunter v. State*, 79 Ark. 432, 96 S.W. 181 (1906); *Anderson v. State*, 84 Ark. 54, 104 S.W. 1096 (1907) (preceding decisions under prior law).

Evidence held sufficient to support conviction. *Kelly v. State*, 191 Ark. 674, 87 S.W.2d 400 (1935); *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949); *Clay v. State*, 236 Ark. 398, 366 S.W.2d 299 (1963); *Williams v. State*, 239 Ark. 686, 393 S.W.2d 618 (1965); *Johnson v. State*, 252 Ark. 50, 477 S.W.2d 196 (1972); *Seals v. State*, 256 Ark. 11, 505 S.W.2d 202 (1974); *King v. State*, 256 Ark. 778, 510 S.W.2d 876 (1974); *Randle v. State*, 257 Ark. 232, 516 S.W.2d 6 (1974) (preceding decisions under prior law); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Jeffers v. State*, 268 Ark. 329, 595 S.W.2d 687 (1980); *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Testimony held sufficient to take case to jury as to guilt of defendant. *Beasley v. State*, 219 Ark. 452, 242 S.W.2d 961 (1951) (decision under prior law).

Evidence sufficient to find appellant guilty of attempted breaking or entering. *Powell v. State*, 33 Ark. App. 1, 799 S.W.2d 566 (1990).

Substantial evidence supported defendant's conviction for breaking and entering where defendant entered the lobby of the post office with the purpose of committing a theft or felony; in addition, there were bullet holes around the locks and doors that contained money, and the expended shells were found to have come from the rifle that was seen in defendant's truck prior to the incident and was recovered from his possession following the incident. *McConnell v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 888 (Dec. 10, 2003).

Defendant's conviction was not rendered infirm merely because fingerprint evidence was the only evidence presented against defendant; the fact-finder did not resort to speculation and conjecture in reaching its verdict as defendant's fingerprints were not found on an easily moveable object, but rather, were located at the apparent location of entry to the car, the location of the crime, on the interior of the car's window. *Phillips v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 662 (Sept. 29, 2004).

Evidence was sufficient to convict defendants of breaking or entering and theft of property where (1) a prosecution witness testified that she saw defendants break into an apartment and take a table; (2) a police officer observed that the security

door had been pried open and the wooden door was kicked in; and (3) a defense witness testified that they took the table for their own use, that none of them owned it, and that there was an owner, but no one knew where the owner was. *Bush v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 302 (Apr. 6, 2005).

Indictment or Information.

In an indictment for burglary, the specific felony intended to be committed by the accused had to be set out or specified but the allegation of the ulterior felony intended need not be set out specifically as would be necessary in an indictment for the actual commission of that felony, and it was sufficient to state the intended offense generally. *Davis v. State*, 117 Ark. 296, 174 S.W. 567 (1915) (decision under prior law).

Upon an information for burglary and grand larceny, one could not be convicted for receiving stolen property. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Since defendant could have been found guilty of burglary upon proof that he committed either the act of breaking or the act of entering, change of wording in information from breaking and entering to breaking or entering was not prejudicial to him for the proof of two separate acts neither added nor subtracted anything from the offense charged or the penalty that could be imposed. *Albright v. State*, 253 Ark. 671, 488 S.W.2d 11 (1972) (decision under prior law).

Instructions.

Where, from the evidence it was clear that defendant broke into an occupiable structure and the only issue left for jury determination was intent, the trial court did not err by refusing to submit defendant's proffered instructions on breaking and entering. *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977).

Intent.

If a man burglariously entered a house with intent to have connection with a woman while she was asleep, it was burglary. *Harvey v. State*, 53 Ark. 425, 14 S.W. 645 (1890) (decision under prior law).

In order to convict for burglary, evidence had to show that defendant entered building with intent to commit a felony.

Sanders v. State, 198 Ark. 880, 131 S.W.2d 936 (1939) (decision under prior law).

Offense of burglary was complete even though intention to commit a felony was not consummated. *Sanders v. State*, 198 Ark. 880, 131 S.W.2d 936 (1939); *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949); *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949); *King v. State*, 256 Ark. 778, 510 S.W.2d 876 (1974) (preceding decisions under prior law).

Evidence held insufficient to show the requisite intent. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

Evidence that defendant had previously cut a window screen in an effort to effect entry for some unknown purpose was inadmissible to show intention of defendant for the unlawful entries upon trial. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

Where the requisite intent could not be incontrovertibly established by defendant's actions in entries with which he was charged, evidence of a similar offense was admissible to show intent. *Hicks v. State*, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

While it was not necessary in a prosecution to show that accused had tools with intent to commit a particular burglary, it was nevertheless proper in all cases to show felonious intent and any evidence legally bearing on felonious intent was admissible. *Randall v. State*, 239 Ark. 312, 389 S.W.2d 229 (1965) (decision under prior law).

Evidence held sufficient to show requisite intent. *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968); *Swanson v. State*, 251 Ark. 147, 471 S.W.2d 351 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1272, 31 L. Ed. 2d 465 (1972) (preceding decisions under prior law).

Where there was sufficient evidence of requisite intent, it was reversible error to permit testimony of another burglary to show defendant's criminal intent. *Swanson v. State*, 251 Ark. 147, 471 S.W.2d 351 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1272, 31 L. Ed. 2d 465 (1972) (decision under prior law).

Circumstantial evidence held sufficient for the jury to conclude that defendant intentionally committed a theft or felony. *Parris v. State*, 270 Ark. App. 269, 604 S.W.2d 582 (Ct. App. 1980).

Defendant's conduct of approaching a locked gun cabinet in a store six times, walking around and behind the counter three times, looking back and forth several times during his last venture behind the counter, removing a gun from the cabinet, and walking away was sufficient for the jury to conclude that he had the intent to commit a theft. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001).

Lesser Included Offenses.

The offense of knowingly receiving stolen property was not a lesser offense of burglary. *Pickens v. State*, 236 Ark. 404, 366 S.W.2d 283 (1963) (decision under prior law).

Breaking and entering is a lesser included offense for burglary. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978).

Where there was no basis for acquitting defendant of burglary, while convicting him of breaking and entering or criminal trespass, the trial court was correct in refusing to instruct on the lesser included offenses of breaking and entering or criminal trespass. *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978).

A person may be convicted of the offense of breaking or entering, as a lesser offense of burglary, whether a building is "occupiable" or not. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987).

Ownership.

In prosecution for crime of burglary, it was not necessary to prove the ownership of the store burglarized. *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949) (decision under prior law).

Product Dispenser, Etc.

Since under this section an electrical meter is not a "product dispenser" or a "similar container" a defendant cannot be charged with breaking or entering into an electrical meter. *State v. Scarmardo*, 263 Ark. 396, 565 S.W.2d 414 (1978).

A violation of this section occurs when a container of the sort described in the statute is sufficiently broken or altered so that the contents or inner works of the device become accessible to entry of any kind. Whether coins or money are actually removed is irrelevant. *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Mere scratch marks on a machine do not constitute a violation of this section.

Stout v. State, 304 Ark. 610, 804 S.W.2d 686 (1991).

Proof.

In a prosecution for burglary in which it was charged that the defendant entered a building with intent to commit grand larceny, it was not necessary that the state show that the defendant stole and carried away money of the owner. Thompson v. State, 177 Ark. 1, 5 S.W.2d 355 (1928) (decision under prior law).

State had the burden of proving by circumstances or direct evidence that defendant made the unlawful entries charged in the information, with the specific intention of committing an assault with intent to rape. Hicks v. State, 231 Ark. 52, 328 S.W.2d 265 (1959) (decision under prior law).

Separate Offenses.

Where defendant charged with both grand larceny and burglary, was found guilty only of burglary, conviction of burglary would be affirmed, as it was not

necessary for conviction of burglary that he also be found guilty of grand larceny. Jackson v. State, 216 Ark. 341, 225 S.W.2d 522 (1949) (decision under prior law).

Convictions for burglary and breaking or entering were proper. Ward v. State, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

Structure.

A fence comes within the meaning of the word "structure," as used in this section. Townsend v. State, 308 Ark. 266, 824 S.W.2d 821 (1992).

Vehicle.

A railway car was the subject of burglary. Parnell v. State, 86 Ark. 241, 110 S.W. 1036 (1908) (decision under prior law).

Cited: Jones v. State, 270 Ark. 328, 605 S.W.2d 7 (1980); Tolley v. State, 1 Ark. App. 1, 611 S.W.2d 798 (1981); Garrison v. State, 13 Ark. App. 245, 682 S.W.2d 772 (1985); Moser v. State, 287 Ark. 105, 696 S.W.2d 744 (1985); Evans v. State, 287 Ark. 136, 697 S.W.2d 879 (1985).

5-39-203. Criminal trespass.

(a) A person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon:

- (1) A vehicle; or
- (2) The premises of another person.

(b) Criminal trespass is a:

- (1) Class B misdemeanor if the vehicle or premises involved is an occupiable structure; or
- (2) Class C misdemeanor if otherwise committed.

History. Acts 1975, No. 280, § 2004; A.S.A. 1947, § 41-2004.

Publisher's Notes. Acts 1985, No. 1090, § 6, provided, in part, that Acts 1985, No. 1090, did not repeal or modify this section.

Cross References. Criminal trespass on land located in unincorporated area, § 5-39-305.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Applicability.
Evidence.

Implied repeal.
Instructions.
Intent.
Jurisdiction.

Jury question.
Lesser included offenses.
Sentence.

Applicability.

This section does not apply to a case where a renter, who was served with a valid notice to quit based upon failure to pay rent, refused to vacate the premises, in view of the more specific statutes regulating a tenant's unlawful detainer. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

Evidence.

Evidence of burglary held insufficient; however, the evidence was sufficient to support a finding that defendant was guilty of the lesser included offense of attempted criminal trespass. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993).

Implied Repeal.

Section 4-70-101, governing trespass by persons refusing to leave a public place of business, was not impliedly repealed by this section. *Culhane v. State*, 282 Ark. 286, 668 S.W.2d 24 (1984).

Instructions.

It was not prejudicial error by the court to refuse to give the proffered instruction on criminal trespass in view of appellant's admission on the stand and in his statement that he intended to go to the courthouse to steal the money before he actually got there. *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986).

Where the court in burglary trial instructed the jury on the lesser included offense of criminal trespass, but refused to give the clearly inapplicable definition of "occupiable structure", there was no error in refusing an instruction which may have misled or confused the jury. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992).

Intent.

Criminal trespass is complete upon the making of an unlawful entry; no intent to engage in further unlawful conduct is necessary. *Brown v. State*, 12 Ark. App. 132, 671 S.W.2d 228 (1984).

Jurisdiction.

Justice of the peace courts had jurisdic-

tion of the offense of unlawful possession of lands, and the contention that the prosecution involved questions relating to the title and right to the possession of the land, was unavailable where such questions had been concluded by former adjudications. *Simpson v. State*, 193 Ark. 623, 101 S.W.2d 795 (1937) (decision under prior law).

Jury Question.

The question whether the defendant took possession of a house on behalf of his son against whom a judgment in unlawful detainer had been rendered for the purpose of obstructing process against the son, or had taken possession in his own right as tenant of the owner with the owner's acquiescence subsequent to the rendition of such judgment, was held for the jury. *State v. Townsend*, 161 Ark. 56, 255 S.W. 312 (1923) (decision under prior law).

Lesser Included Offenses.

Where there was no basis for acquitting defendant of burglary, the trial court was correct in refusing to instruct on the lesser included offenses of breaking and entering or criminal trespass. *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978).

Criminal trespass meets all of the requirements of being a lesser included offense of burglary. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Refusal to give the instruction requested by the defendant on the lesser included offense of criminal trespass held error. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

Sentence.

Defendant's sentence for criminal trespass was not executed by the lapse of time on the sentence where the defendant was released under a void order prior to the completion of the sentence. *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987).

Cited: *Wilson v. City of Pine Bluff*, 6 Ark. App. 286, 641 S.W.2d 33 (1982); *Moore v. Lockhart*, 740 F.2d 14 (8th Cir. 1984); *Polk v. State*, 28 Ark. App. 282, 772 S.W.2d 368 (1989); *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990); *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

5-39-204 — 5-39-209. [Reserved.]**5-39-210. Forcible possession of land.**

Any person who takes or keeps possession of any real estate by actual force or violence without the authority of law, or who, being armed with a deadly or dangerous weapon, by violence to any person entitled to the possession, or by putting in fear of immediate danger to his or her person obtains or keeps possession of any real estate or property without legal authority upon conviction is adjudged guilty of a Class A misdemeanor.

History. Rev. Stat., ch. 44, div. 8, art. 1, § 6; C. & M. Dig., § 2779; Pope's Dig., § 3483; A.S.A. 1947, § 41-2051; Acts 2005, No. 1994, § 220.

Amendments. The 2005 amendment

inserted "or her" and "Class A" and deleted "and be fined not less than fifty dollars (\$50.00) and be imprisoned not exceeding one (1) year" from the end.

CASE NOTES**Forcible Detainer by Landlord.**

Although landlord who was entitled to re-enter the property on condition of a broken lease took possession peaceably in the absence of the tenants, he had the right to protect his possession by force, if

necessary, against the former tenant, as well as anyone else. *Winn v. State*, 55 Ark. 360, 18 S.W. 375 (1892).

Cited: *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

5-39-211. Cemeteries — Mining and other unlawful entries.

(a) It is unlawful for any corporation, company, or individual to:

(1) Mine, extract, or remove coal from under, beneath, or within the buffer zone for a cemetery, graveyard, or burying place in this state as specified in rules promulgated by the Arkansas Pollution Control and Ecology Commission under the Arkansas Surface Coal Mining and Reclamation Act of 1979, § 15-58-101 et seq.;

(2)(A) Mine, extract, or remove any other mineral substance from under, beneath, or within twenty-five feet (25') of the boundary of any cemetery, graveyard, or burying place in this state.

(B) This subdivision (a)(2) does not apply to oil, gas, or any other hydrocarbon produced in a liquid or gaseous form; or

(3) Make, place, or drive any slope, pit, or entry of any kind into, under, through, or across any cemetery, graveyard, or other burying place in this state.

(b) Any corporation, company, or individual violating a provision of this section is guilty of a Class D felony.

History. Acts 1907, No. 58, §§ 1-3, p. 138; C. & M. Dig., §§ 2728, 2729; Pope's Dig., §§ 3414, 3415; A.S.A. 1947, §§ 41-1981 — 41-1983; Acts 2005, No. 1994, § 422; 2005, No. 2232, § 1.

Amendments. The 2005 amendment

by No. 1994, in (b), inserted "Class D" and deleted "and upon conviction shall be fined in any sum not less than one thousand dollars (\$1,000) and be imprisoned not less than one (1) year nor more than five (5) years" from the end.

The 2005 amendment by No. 2232 inserted the former (1)(A), (1)(B), and (2)(A) designations in (a); inserted “from under, beneath ... § 15-58-101 et seq.” in present (a)(1); inserted “Mine, extract, or remove”

and “or within twenty-five feet (25') of the boundary of” in present (a)(2)(A); added present (a)(2)(B); and made related changes.

5-39-212. Cemeteries — Access — Debris — Disturbance.

(a)(1) It is unlawful for any person, firm, corporation, partnership, or association to construct any fence on any property in such a manner as to enclose any cemetery, graveyard, or burying place unless reasonable access by automobile to the cemetery is provided by gate or otherwise.

(2) As used in this subsection, “cemetery” is not intended to apply to any private family burial plot that:

(A) Contains fewer than six (6) commercial grave markers;

(B) Has not been used for a burial purpose for at least twenty-five (25) years; and

(C) Has not had an access road to the burial plot for at least thirty (30) years.

(3) Nothing in this section prohibits the placement of a fence around any cemetery for the purpose of defining a boundary or protection of a grave site, if any fence or gate is sufficiently maintained.

(b)(1) Any person, firm, corporation, partnership, or association violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100).

(2) Every day that the violation exists is a separate offense.

History. Acts 1955, No. 108, §§ 1-3; 1983, No. 742, § 1; A.S.A. 1947, §§ 41-1984 — 41-1986; Acts 1995, No. 1317, § 1; 1997, No. 1244, § 3; 1997, No. 1286, § 1; 2005, No. 1994, § 48; 2005, No. 2232, § 2.

Amendments. The 2005 amendment by No. 1994 substituted “violation” for “misdemeanor” in (b).

The 2005 amendment by No. 2232 redesignated former (a) as present (a)(1); in present (a)(1), inserted “graveyard, or burying place” and substituted “reason-

able access” for “suitable access”; inserted “if all fences and gates are sufficiently maintained” in present (a)(3); and made related changes.

Cross References. Cemetery access roads, § 14-14-812.

Cemeteries generally, § 20-17-901 et seq.

Cemetery Act for Perpetually Maintained Cemeteries, § 20-17-1001 et seq.

Cemetery improvement districts, § 20-17-1101 et seq.

5-39-213. Advertising on property without owner's written permission.

(a) It is unlawful for any person, firm, or corporation to place any advertising on any property in this state without first securing the written permission of the owner of the property.

(b) Any person violating a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

History. Acts 1941, No. 359, §§ 1, 3; A.S.A. 1947, §§ 41-2052, 41-2053; Acts 2005, No. 1994, § 48.

Publisher's Notes. Acts 1941, No. 359, § 3, is also codified as § 5-67-101(b).

Amendments. The 2005 amendment

substituted "violation" for "misdemeanor" in (b).

Cross References. Placing advertising signs on highway right-of-ways, § 5-67-101.

5-39-214. Unauthorized entry of a school bus — Posting of warning on a school bus.

(a) As used in this section:

(1) "Driver" means the operator of a school bus; and

(2) "School bus" means any publicly or privately owned motor vehicle designed for transporting ten (10) or more passengers and operated for the transportation of children to or from school or a school activity.

(b) A person over eighteen (18) years of age is guilty of a Class B misdemeanor if the person:

(1) Enters a school bus with the intent to commit a criminal offense;

(2) Enters a school bus and disregards an order or instruction of the driver;

(3)(A) Enters a school bus and refuses to leave the school bus after being ordered to leave by the driver.

(B) Subdivision (b)(3)(A) of this section does not apply if the person being asked to leave is:

(i) A law enforcement officer acting within the scope of his or her authority as a peace officer; or

(ii) Authorized by the school district to board the school bus as:

(a) A student; or

(b) An individual employed by the school district or volunteering as a participant in a school activity;

(4) Intentionally causes or attempts to cause a disruption or an annoyance to another person on the bus; or

(5) Recklessly engages in conduct that creates a substantial risk of creating apprehension in any person on the bus.

(c)(1) Any school district or private school shall cause a sign to be placed on any school bus next to any entrance on the school bus warning that unauthorized entry of a school bus is a violation of state law.

(2) The absence of a clearly legible sign on any school bus or next to any entrance on the school bus warning that unauthorized entry of a school bus is a violation of state law is not a defense to a violation of this section.

History. Acts 2005, No. 247, § 1.

SUBCHAPTER 3 — OFFENSES INVOLVING POSTED AND ENCLOSED LAND

SECTION.

5-39-301. Leaving open enclosure of another.

SECTION.

5-39-302. Unlawful entry upon enclosed grazing land.

SECTION.

5-39-303. [Repealed.]

5-39-304. Notice to cease entering — Further entrance.

SECTION.

5-39-305. Criminal trespass on land located in unincorporated area.

Cross References. Criminal mischief, §§ 5-38-203, 5-38-204.

Permissive recreational use of land, § 18-11-301.

Posting of lands, § 18-11-401 et seq.

Effective Dates. Acts 1875, No. 33, § 2: effective on passage.

Acts 1975, No. 197, § 6: Feb. 18, 1975.

Emergency clause provided: "It is hereby found and determined by the General Assembly that the present penalties for the criminal act of trespass are insufficient to be a deterrent to the commission of the

crime; that great damage to both real and personal property results from trespassers; and that immediate passage of this act is necessary to eliminate the criminal act of trespass and promote the more efficient administration of justice. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-39-301. Leaving open enclosure of another.

A person is guilty of a Class A misdemeanor if he or she pulls down or breaks a fence or opens a gate and fails to close the gate of a farm, plantation, or other enclosed ground of another person.

History. Acts 1875, No. 33, § 1, p. 90; C. & M. Dig., §§ 2532, 4816; Pope's Dig., §§ 3181, 5917; Acts 1941, No. 314, §§ 1, 2; 1975, No. 197, § 1; 1985, No. 1070, § 1; A.S.A. 1947, § 41-2054; Acts 1999, No. 1029, § 1.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Consent.
Defenses.
Enclosed ground.
Indictment or information.
Owner.

Consent.

Where the defendant reserved the right to cut and remove the merchantable timber, he had the right to go on the land for one purpose only; and when he broke down a gate and tore down the fence around the land, he was guilty of trespass. *Miller v. State*, 109 Ark. 362, 159 S.W. 1125 (1913).

Defenses.

A violation of this section cannot be excused by showing that it was committed through mistake as to the boundary line, when such mistake was due to negligence on part of the offender. *Clark v. State*, 50 Ark. 570, 9 S.W. 431 (1888).

Enclosed Ground.

It is not a misdemeanor for one to break a partition fence between one's lot and the lot of another, the common property of both. *Drees v. State*, 37 Ark. 122 (1881).

Whether or not a natural barrier may be of such a character as to serve as part of an enclosure is a question of fact for each particular case and it has been held that

the boundary of certain land by a navigable lake was not such a natural barrier as was contemplated by this section. *Barboro v. Boyle*, 119 Ark. 377, 178 S.W. 378 (1915).

Indictment or Information.

An indictment for trespass which alleges that the defendant did unlawfully and willfully pull down the fence of another without alleging injury or damage to the latter is sufficient. *State v. Culbreath*, 71 Ark. 80, 71 S.W. 254 (1902).

Owner.

One who has control and possession of the enclosure is the owner within the meaning of this section. *Wellington v. State*, 52 Ark. 266, 12 S.W. 562 (1889).

The allegation of ownership of land was held good where the defendant was charged with having cut a gate on the land of another who was not the owner of the land but of the fence around land. *Miller v. State*, 109 Ark. 362, 159 S.W. 1125 (1913).

5-39-302. Unlawful entry upon enclosed grazing land.

(a) It is unlawful for any person to enter upon any enclosed grazing land except by way of a gate, gap, or other opening.

(b) Any person entering upon enclosed grazing land is guilty of a violation and shall be punished by a fine of:

(1) Not less than one hundred dollars (\$100) for the first offense; or

(2) Not less than two hundred fifty dollars (\$250) for the second offense.

History. Acts 1969, No. 338, §§ 1, 3; 1975, No. 197, § 4; A.S.A. 1947, §§ 41-2055, 41-2057; Acts 1999, No. 1029, § 2; 2005, No. 1994, § 49.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in (b).

5-39-303. [Repealed.]

Publisher's Notes. This section, concerning the posting of pastures, farms, reservoirs, etc., was repealed by Acts 1999, No. 1029, § 3. The section was de-

rived from Acts 1971, No. 713, §§ 1, 2; 1975, No. 197, § 5; A.S.A. 1947, §§ 41-2058, 41-2059.

5-39-304. Notice to cease entering — Further entrance.

(a) The owner, agent, lessee, or assignee of any land, including farm, timber, or otherwise, may notify any person by certified mail, deliver to addressee only or by notice served by any official authorized to serve process to cease any trespass or to stay off the premises of any property belonging to the owner, his or her agent, or assignee.

(b) Notice shall specify the land by description containing section, township, and range.

(c) Any person receiving notice shall immediately cease any trespass or entrance upon the described land of the owner.

(d) Any further entrance or trespass by the person receiving the notice is considered a criminal trespass and the person is guilty of a Class C misdemeanor.

History. Acts 1969, No. 338, § 2; 1975, No. 197, § 3; A.S.A. 1947, § 41-2056; Acts

2003, No. 1178, § 1; 2005, No. 1994, § 437.

Amendments. The 2003 amendment, in (a), substituted “certified mail, deliver to addressee only” for “registered letter” and made minor punctuation and gender neutral changes.

The 2005 amendment, in (a), substituted “assignee” for “assign” or “assigns” in two places and deleted “or by personal

oral notification” following “to serve process”; and, in (d), inserted “Class C” and deleted “and upon conviction shall be fined in any sum not less than two hundred fifty dollars (\$250) nor more than five hundred dollars (\$500)” from the end.

Cross References. Criminal trespass, § 5-39-203.

5-39-305. Criminal trespass on land located in unincorporated area.

- (a)(1) A person shall not enter without written permission of the owner or lessee upon another person’s land located outside the boundary of any city or town if that land is either:
- (A) Lawfully posted;
 - (B) Crop land; or
 - (C) Enclosed with a fence sufficient under § 2-39-101 et seq.
- (2) The posting of land is not a requirement under this section.
- (b)(1) Any person who violates this section is deemed guilty of a violation and is subject to a fine not to exceed one hundred dollars (\$100).
- (2) However, a violation of this section is a Class B misdemeanor if the property was posted pursuant to the laws of this state.
- (c) It is an affirmative defense to a prosecution that:
- (1) The person did not knowingly enter upon another person’s land;
 - (2) The person was a guest or invitee;
 - (3) The person was required to enter upon the premises of another person for a business reason or for health and safety reasons;
 - (4) The person was authorized by law to enter upon the land; or
 - (5) The privately owned land was made open to the public.
- (d)(1) This section does not apply to public land.
- (2) This section does not apply to a law enforcement officer in the line of duty.
- (e) Nothing in this section repeals any law concerning posting of land or trespass.

History. Acts 1995, No. 870, §§ 1, 2; 1999, No. 1029, § 4.

A.C.R.C. Notes. References to “this chapter” in subchapters 1 and 2, and §§ 5-

39-301 — 5-39-304 may not apply to this section which was enacted subsequently.

Cross References. Criminal trespass, § 5-39-203.

SUBCHAPTER 4 — OFFENSES INVOLVING CEMETERY OR GRAVE MARKERS

SECTION.	SECTION.
5-39-401. Destruction or removal of a cemetery or grave marker.	5-39-402. [Repealed.]

A.C.R.C. Notes. References to “this chapter” in subchapters 1-3 may not apply

to this subchapter which was enacted subsequently.

5-39-401. Destruction or removal of a cemetery or grave marker.

(a) It is unlawful for any person, corporation, company, or other entity to destroy or carry away any cemetery marker or grave marker.

(b) Destruction or removal of a cemetery or grave marker is a Class D felony.

History. Acts 1997, No. 1244, § 1; 2005, No. 1994, § 327; 2005, No. 2232, § 3.

Amendments. The 2005 amendment by No. 1994 added the subsection (a) designation; and added (b).

The 2005 amendment by No. 2232 inserted "corporation, company, or other entity" in present (a).

5-39-402. [Repealed.]

Publisher's Notes. This section, concerning the penalty for violation of provisions of the subchapter, was repealed by

Acts 2005, No. 1994, § 530. The section was derived from Acts 1997, No. 1244, § 2.

CHAPTER 40

PUBLIC LANDS

SECTION.

5-40-101, 5-40-102. [Repealed.]

5-40-103. Removal of improvements to land after forfeiture to state.

SECTION.

5-40-104. [Repealed.]

Cross References. Burglary, trespass and other intrusions, § 5-39-101 et seq.

Removal of trees growing below high water mark of navigable rivers or streams, § 5-72-102.

Effective Dates. Acts 1869 (Adj. Sess.), No. 93, § 13: effective on passage.

Acts 1967, No. 328, § 12: Mar. 13, 1967. Emergency clause provided: "It is hereby found and determined by the General Assembly that the State of Arkansas has a substantial investment in its institutions and the lands and improvements devoted to their functions; that doubts exist concerning the right to police and regulate

certain activities which should be regulated for the protection of these State institutions; that urgent reasons exist for providing for the adequate police authority which this enactment will achieve; and that only by the immediate passage of this Act may these objectives be achieved. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety and for the protection of the public property, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 75 Am. Jur. 2d, Trespass, § 25 et seq.

C.J.S. 87 C.J.S., Trespass, § 172 et seq.

5-40-101, 5-40-102. [Repealed.]

Publisher's Notes. These sections, concerning trespassers on school lands and cutting or removing timber or stone from sixteenth-section land, were repealed by Acts 2005, No. 1994, § 518. The sections were derived from:

5-40-101. Acts 1869 (Adj. Sess.), No. 93,

§ 13, p. 190; C. & M. Dig., § 2551; Pope's Dig., § 3198; A.S.A. 1947, § 10-305.

5-40-102. Acts 1843, §§ 1-3, p. 60; C. & M. Dig., §§ 2548-2550; Pope's Dig., §§ 3195-3197; A.S.A. 1947, §§ 10-302 — 10-304.

5-40-103. Removal of improvements to land after forfeiture to state.

(a) In any case in which any land or town or city lot has been forfeited to the State of Arkansas for the nonpayment of taxes and the title of the state to the land or town or city lot has been confirmed, it is unlawful after the date of the confirmation decree for the former owner or any other person to remove from the land or town or city lot any building, fence, or other improvement on the land or town or city lot or to buy or sell any building, fence, or other improvement on the land or town or city lot.

(b) Any person violating any provision of this section is guilty of a Class B misdemeanor and is liable to the State of Arkansas for three (3) times the amount of the value of the improvement, as defined in subsection (a) of this section, so sold, damaged, or removed.

History. Acts 1943, No. 224, §§ 1, 2; A.S.A. 1947, §§ 10-308, 10-309; Acts 2005, No. 1994, § 380.

Amendments. The 2005 amendment, in (b), substituted "be guilty of a Class B misdemeanor" for "be deemed guilty of a

misdemeanor" and deleted "and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500)" following "misdemeanor" from the end.

5-40-104. [Repealed.]

Publisher's Notes. This section, concerning unlawful possession of state property, was repealed by Acts 2005, No. 1994,

§ 519. The section was derived from Acts 1967, No. 328, § 3; A.S.A. 1947, § 7-114.

CHAPTER 41**COMPUTER-RELATED CRIMES****SUBCHAPTER**

1. COMPUTER-RELATED CRIME.
2. COMPUTER CRIMES.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 10
UALR L.J. 559.

SUBCHAPTER 1 — COMPUTER-RELATED CRIME

SECTION.

- 5-41-101. Purpose.
- 5-41-102. Definitions.
- 5-41-103. Computer fraud.
- 5-41-104. Computer trespass.
- 5-41-105. Venue of violations.
- 5-41-106. Civil actions.

SECTION.

- 5-41-107. Assistance of Attorney General.
- 5-41-108. Unlawful computerized communications.
- 5-41-109. Disclosure of personal information.

A.C.R.C. Notes. Because of the enactment of Subchapter 2 of this chapter by Acts 2001, No. 1496, the provisions of this chapter existing before that act have been designated as Subchapter 1.

References to "this subchapter" in §§ 5-41-101 — 5-41-107 may not apply to § 5-41-108 which was enacted subsequently.

Cross References. Computer crimes against minors, § 5-27-601 et seq.

5-41-101. Purpose.

It is found and determined that:

- (1) Computer-related crime poses a major problem for business and government;
- (2) Losses for each incident of computer-related crime are potentially astronomical;
- (3) The opportunities for computer-related crime in business and government through the introduction of fraudulent records into a computer system, the unauthorized use of computers, the alteration or destruction of computerized information or files, and the stealing of financial instruments, data, and other assets are great;
- (4) Computer-related crime has a direct effect on state commerce; and
- (5) While various forms of computer-related crime might possibly be the subject of criminal charges based on other provisions of law, it is appropriate and desirable that a statute be enacted which deals directly with computer-related crime.

History. Acts 1987, No. 908, § 1.

5-41-102. Definitions.

As used in subchapter:

- (1) "Access" means to instruct, communicate with, store data in, or retrieve data from a computer, computer system, or computer network;
- (2) "Computer" means an electronic device that performs a logical, arithmetic, or memory function by manipulating an electronic or magnetic impulse and includes any input, output, processing, storage, computer software, or communication facility that is connected or related to that device in a system or a network;

(3) "Computer network" means the interconnection of communications lines with a computer through a remote terminal or a complex consisting of two (2) or more interconnected computers;

(4) "Computer program" means a set of instructions, statements, or related data that, in actual or modified form, is capable of causing a computer or a computer system to perform a specified function;

(5) "Computer software" means one (1) or more computer programs, existing in any form, or any associated operational procedure, manual, or other documentation;

(6) "Computer system" means a set of related, connected, or unconnected computers, other devices, and software;

(7) "Data" means any representation of information, knowledge, a fact, concept, or an instruction that is being prepared or has been prepared and is intended to be processed or stored, is being processed or stored, or has been processed or stored in a computer, computer network, or computer system;

(8) "Financial instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit card, debit card, transaction authorization mechanism, marketable security, or any computer system representation thereof;

(9) "Message" means any transfer of a sign, signal, writing, image, sound, data, or intelligence of any nature, or any transfer of a computer program;

(10) "Property" includes, but is not limited to, a financial instrument, data, computer program, document associated with a computer or computer program, or a copy of a financial instrument, data, computer program, or document associated with a computer or computer program, whether tangible or intangible, including both human and computer readable data, and data while in transit;

(11) "Service" includes, but is not limited to, the use of a computer, a computer system, a computer network, computer software, a computer program, or data.

History. Acts 1987, No. 908, § 2; 1997, No. 1153, § 1.

5-41-103. Computer fraud.

(a) A person commits computer fraud if the person intentionally accesses or causes to be accessed any computer, computer system, computer network, or any part of a computer, computer system, or computer network for the purpose of:

(1) Devising or executing any scheme or artifice to defraud or extort; or

(2) Obtaining money, property, or a service with a false or fraudulent intent, representation, or promise.

(b) Computer fraud is a Class D felony.

History. Acts 1987, No. 908, § 3.

5-41-104. Computer trespass.

(a) A person commits computer trespass if the person intentionally and without authorization accesses, alters, deletes, damages, destroys, or disrupts any computer, computer system, computer network, computer program, or data.

(b) Computer trespass is a:

(1) Class C misdemeanor if it is a first violation that does not cause any loss or damage;

(2) Class B misdemeanor if it is a:

(A) Second or subsequent violation that does not cause any loss or damage; or

(B) Violation that causes loss or damage of less than five hundred dollars (\$500);

(3) Class A misdemeanor if it is a violation that causes loss or damage of five hundred dollars (\$500) or more, but less than two thousand five hundred dollars (\$2,500); and

(4) Class D felony if it is a violation that causes loss or damage of two thousand five hundred dollars (\$2,500) or more.

History. Acts 1987, No. 908, § 4.

5-41-105. Venue of violations.

For the purpose of venue under this subchapter, any violation of this subchapter is considered to have been committed in any county:

(1) In which any act was performed in furtherance of any course of conduct that violated this subchapter;

(2) In which any violator had control or possession of any proceeds of the violation or of any book, record, document, property, financial instrument, computer software, computer program, data, or other material or object that was used in furtherance of the violation;

(3) From which, to which, or through which any access to a computer or computer network was made whether by a wire, electromagnetic wave, microwave, or any other means of communication; or

(4) In which any computer, computer system, or computer network is an object or an instrument of the violation is located at the time of the alleged violation.

History. Acts 1987, No. 908, § 5.

Cross References. Venue, § 16-60-101 et seq.

5-41-106. Civil actions.

(a)(1) Any person whose property or person is injured by reason of a violation of any provision of this subchapter may sue for the injury and recover for any damages sustained and the costs of suit.

(2) Without limiting the generality of the term, “damages” include loss of profits.

(b) At the request of any party to an action brought pursuant to this section, in its discretion, the court may conduct any legal proceeding in such a way as to protect the secrecy and security of the computer, computer system, computer network, computer program, computer software, and data involved in order to prevent possible reoccurrence of the same or a similar act by another person and to protect any trade secret of any party.

(c) No civil action under this section may be brought except within three (3) years from the date the alleged violation of this subchapter is discovered or should have been discovered by the exercise of reasonable diligence.

History. Acts 1987, No. 908, § 6.

5-41-107. Assistance of Attorney General.

If requested to do so by a prosecuting attorney, the Attorney General may assist the prosecuting attorney in the investigation or prosecution of an offense under this subchapter or any other offense involving the use of a computer.

History. Acts 1987, No. 908, § 7.

5-41-108. Unlawful computerized communications.

(a) A person commits the offense of unlawful computerized communications if, with the purpose to frighten, intimidate, threaten, abuse, or harass another person, the person sends a message:

(1) To the other person on an electronic mail or other computerized communication system and in that message threatens to cause physical injury to any person or damage to the property of any person;

(2) On an electronic mail or other computerized communication system with the reasonable expectation that the other person will receive the message and in that message threatens to cause physical injury to any person or damage to the property of any person;

(3) To another person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd, or profane language; or

(4) On an electronic mail or other computerized communication system with the reasonable expectation that the other person will receive the message and in that message uses any obscene, lewd, or profane language.

(b) Unlawful computerized communications is a Class A misdemeanor.

(c)(1) The judicial officer in a court of competent jurisdiction shall upon pretrial release of the defendant enter an order consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and

shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) A protective order under subdivision (c)(1) of this section remains in effect during the pendency of any appeal of a conviction under this section.

History. Acts 1997, No. 1153, § 2.

not apply to this section which was enacted subsequently.

A.C.R.C. Notes. References to “this chapter” in §§ 5-41-101 to 5-41-107 may

5-41-109. Disclosure of personal information.

An internet service provider shall disclose personally identifiable information concerning a consumer pursuant to a subpoena, warrant, or court order issued under authority of a law of this state, another state, or the United States Government.

History. Acts 2003, No. 1087, § 6.

SUBCHAPTER 2 — COMPUTER CRIMES

SECTION.

5-41-201. Definitions.

5-41-202. Unlawful act regarding a computer.

5-41-203. Unlawful interference with access to computers — Unlawful use or access to computers.

SECTION.

5-41-204. Unlawful use of encryption.

5-41-205. Unlawful act involving electronic mail.

5-41-206. Computer password disclosure.

5-41-201. Definitions.

As used in this subchapter:

(1) “Access” means to intercept, instruct, communicate with, store data in, retrieve from, or otherwise make use of any resource of a computer, network, or data;

(2)(A) “Computer” means an electronic, magnetic, electrochemical, or other high-speed data-processing device performing a logical, arithmetic, or storage function and includes any data storage facility or communications facility directly related to or operating in conjunction with the device.

(B) “Computer” also includes any online service, internet service, local bulletin board, any electronic storage device, including a floppy disk or other magnetic storage device, or any compact disk that has read-only memory and the capacity to store audio, video, or written material;

(3)(A) “Computer contaminant” means any data, information, image, program, signal, or sound that is designed or has the capability to:

(i) Contaminate, corrupt, consume, damage, destroy, disrupt, modify, record, or transmit; or

(ii) Cause to be contaminated, corrupted, consumed, damaged, destroyed, disrupted, modified, recorded, or transmitted any other

data, information, image, program, signal, or sound contained in a computer, system, or network without the knowledge or consent of the person who owns the other data, information, image, program, signal, or sound or the computer, system, or network.

(B) "Computer contaminant" includes, but is not limited to:

(i) A virus, worm, or trojan horse; or

(ii) Any other similar data, information, image, program, signal, or sound that is designed or has the capability to prevent, impede, delay, or disrupt the normal operation or use of any component, device, equipment, system, or network;

(4) "Data" means a representation of any form of information, knowledge, a fact, concept, or an instruction that is being prepared or has been formally prepared and is intended to be processed, is being processed, or has been processed in a system or network;

(5) "Encryption" means the use of any protection or disruptive measure, including, without limitation, cryptography, enciphering, encoding, or a computer contaminant to:

(A) Prevent, impede, delay, or disrupt access to any data, information, image, program, signal, or sound;

(B) Cause or make any data, information, image, program, signal, or sound unintelligible or unusable; or

(C) Prevent, impede, delay, or disrupt the normal operation or use of any component, device, equipment, system, or network;

(6) "Information service" means a service that is designed or has the capability to generate, process, store, retrieve, convey, emit, transmit, receive, relay, record, or reproduce any data, information, image, program, signal, or sound by means of any component, device, equipment, system, or network, including, but not limited to, by means of:

(A) A computer, computer system, computer network, modem, or scanner;

(B) A telephone, cellular phone, satellite phone, pager, personal communications device, or facsimile machine;

(C) Any type of transmitter or receiver; or

(D) Any other component, device, equipment, system, or network that uses analog, digital, electronic, electromagnetic, magnetic, or optical technology;

(7) "Internet service provider" means any provider who provides a subscriber with access to the internet or an electronic mail address, or both;

(8)(A) "Network" means a set of related and remotely connected devices and facilities, including more than one (1) system, with the capability to transmit data among any of the devices and facilities.

(B) "Network" includes, but is not limited to, a local, regional, or global computer network;

(9) "Program" means an ordered set of data representing coded instructions or statements that can be executed by a computer and cause the computer to perform one (1) or more tasks;

(10) "Property" means anything of value and includes a financial instrument, information, electronically produced data, program, and any other tangible or intangible item of value;

(11) "Provider" means any person who provides an information service; and

(12) "System" means a set of related equipment, whether or not connected, that is used with or for a computer.

History. Acts 2001, No. 1496, § 2.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-41-202. Unlawful act regarding a computer.

(a) A person commits an unlawful act regarding a computer if the person knowingly and without authorization:

(1) Modifies, damages, destroys, discloses, uses, transfers, conceals, takes, retains possession of, copies, obtains or attempts to obtain access to, permits access to or causes to be accessed, or enters data or a program that exists inside or outside a computer, system, or network;

(2) Modifies, destroys, uses, takes, damages, transfers, conceals, copies, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, equipment or supplies that are used or intended to be used in a computer, system, or network;

(3) Destroys, damages, takes, alters, transfers, discloses, conceals, copies, uses, retains possession of, obtains or attempts to obtain access to, permits access to or causes to be accessed, a computer, system, or network;

(4) Obtains and discloses, publishes, transfers, or uses a device used to access a computer, network, or data; or

(5) Introduces, causes to be introduced, or attempts to introduce a computer contaminant into a computer, system, or network.

(b) An unlawful act regarding a computer is a:

(1) Class A misdemeanor; or

(2) Class C felony if the act:

(A) Was committed to devise or execute a scheme to defraud or illegally obtain property;

(B) Caused damage in excess of five hundred dollars (\$500); or

(C) Caused an interruption or impairment of a public service, including, without limitation, a:

(i) Governmental operation;

(ii) System of public communication or transportation; or

(iii) Supply of water, gas, or electricity.

History. Acts 2001, No. 1496, § 2.

**5-41-203. Unlawful interference with access to computers —
Unlawful use or access to computers.**

(a)(1) A person commits unlawful interference with access to computers if the person knowingly and without authorization interferes with, denies, or causes the denial of access to or use of a computer, system, or network to a person who has the duty and right to use the computer, system, or network.

(2) Unlawful interference with access to computers is a Class A misdemeanor.

(b)(1) A person commits unlawful use or access to computers if the person knowingly and without authorization uses, causes the use of, accesses, attempts to gain access to, or causes access to be gained to a computer, system, network, telecommunications device, telecommunications service, or information service.

(2) Unlawful use or access to computers is a Class A misdemeanor.

(c) If the violation of subsection (a) or (b) of this section was committed to devise or execute a scheme to defraud or illegally obtain property, the person is guilty of a Class C felony.

(d)(1) It is an affirmative defense to a charge made pursuant to this section that at the time of the alleged offense the person reasonably believed that:

(A) The person was authorized to use or access the computer, system, network, telecommunications device, telecommunications service, or information service and the use or access by the person was within the scope of that authorization; or

(B) The owner or other person authorized to give consent would authorize the person to use or access the computer, system, network, telecommunications device, telecommunications service, or information service.

(2) A person who intends to offer an affirmative defense provided in subdivision (d)(1) of this section at a trial or preliminary hearing shall file and serve on the prosecuting attorney a notice of that intent not less than fourteen (14) calendar days before the trial or hearing or at such other time as the court may direct.

History. Acts 2001, No. 1496, § 2.

5-41-204. Unlawful use of encryption.

(a) A person commits unlawful use of encryption if the person knowingly uses or attempts to use encryption, directly or indirectly, to:

(1) Commit, facilitate, further, or promote any criminal offense;

(2) Aid, assist, or encourage another person to commit any criminal offense;

(3) Conceal the commission of any criminal offense;

(4) Conceal or protect the identity of a person who has committed any criminal offense; or

(5) Delay, hinder, or obstruct the administration of the law.

(b) A person who violates any provision of this section commits a criminal offense that is separate and distinct from any other criminal offense and may be prosecuted and convicted pursuant to this section whether or not the person or any other person is or has been prosecuted or convicted for any other criminal offense arising out of the same facts as the violation of this section.

(c) An unlawful use of encryption is a:

(1) Class D felony if the criminal offense concealed by encryption is a Class Y felony, Class A felony, or Class B felony;

(2) Class A misdemeanor if the criminal offense concealed by encryption is a Class C felony, Class D felony, or an unclassified felony; or

(3) Misdemeanor classed one (1) degree below the misdemeanor constituted by the criminal offense concealed by encryption for any other unlawful use of encryption.

History. Acts 2001, No. 1496, § 2.

5-41-205. Unlawful act involving electronic mail.

(a) A person commits an unlawful act involving electronic mail if, with the purpose to devise or execute a scheme to defraud or illegally obtain property, the person:

(1) Knowingly and with the purpose to transmit or cause to be transmitted the item of electronic mail to the electronic mail address of one (1) or more recipients without their knowledge of or consent to the transmission falsifies or forges any data, information, image, program, signal, or sound that:

(A) Is contained in the header, subject line, or routing instructions of an item of electronic mail; or

(B) Describes or identifies the sender, source, point of origin, or path of transmission of an item of electronic mail;

(2) Purposely transmits or causes to be transmitted an item of electronic mail to the electronic mail address of one (1) or more recipients without their knowledge of or consent to the transmission, if the person knows or has reason to know that the item of electronic mail contains or has been generated or formatted with:

(A) An internet domain name that is being used without the consent of the person who holds the internet domain name; or

(B) Any data, information, image, program, signal, or sound that has been used intentionally in the header, subject line, or routing instructions of the item of electronic mail to falsify or misrepresent:

(i) The identity of the sender; or

(ii) The source, point of origin, or path of transmission of the item of electronic mail; or

(3) Knowingly sells, gives, or otherwise distributes or possesses with the intent to sell, give, or otherwise distribute any data, information, image, program, signal, or sound that is designed or intended to be used to falsify or forge any data, information, image, program, signal, or sound that:

- (A) Is contained in the header, subject line, or routing instructions of an item of electronic mail; or
- (B) Describes or identifies the sender, source, point of origin, or path of transmission of an item of electronic mail.
- (b) Subdivision (a)(2) of this section does not apply to an internet service provider who, in the course of providing service, transmits or causes to be transmitted an item of electronic mail on behalf of another person, unless the internet service provider is the person who first generates the item of electronic mail.
- (c) An unlawful act involving electronic mail is a Class D felony.

History. Acts 2001, No. 1496, § 2.

RESEARCH REFERENCES

ALR. Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution. 98 ALR 5th 167.

5-41-206. Computer password disclosure.

- (a) A person commits computer password disclosure if the person purposely and without authorization discloses a number, code, password, or other means of access to a computer or computer network that is subsequently used to access a computer or computer network.
- (b) Computer password disclosure is a:
 - (1) Class A misdemeanor; or
 - (2) Class D felony if the violation of subsection (a) of this section was committed to devise or execute a scheme to defraud or illegally obtain property.

History. Acts 2001, No. 1496, § 2; inserted “that is subsequently used to access a computer or computer network”
Amendments. The 2005 amendment in (a).

CHAPTER 42
CRIMINAL USE OF PROPERTY

SUBCHAPTER.

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. ARKANSAS CRIMINAL USE OF PROPERTY OR LAUNDERING CRIMINAL PROCEEDS ACT.

SUBCHAPTER 1 — GENERAL PROVISIONS
[Reserved]

SUBCHAPTER 2 — ARKANSAS CRIMINAL USE OF PROPERTY OR LAUNDERING
CRIMINAL PROCEEDS ACT

SECTION.

- 5-42-201. Title. declarations, and intent.
- 5-42-202. General legislative findings, 5-42-203. Definitions.

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5-42-204. Criminal use of property or laundering criminal proceeds.

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5-42-205. Investigative powers.

A.C.R.C. Notes. Acts 1993, No. 1148, § 7, provided: "If any provision of Arkansas Criminal Use of Property and/or Laundering Criminal Proceeds Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable."

Acts 1993, No. 1148, § 8, provided: "All laws and parts of laws in conflict with this act are hereby repealed. However, there is no intent by enactment of this act to repeal existing state law governing substantive criminal offenses, including those mentioned herein, or enhancement of penalties relating to those offenses, and this act is designed to provide alternative remedies to those which exist under current state law."

5-42-201. Title.

This subchapter shall be known as the "Arkansas Criminal Use of Property or Laundering Criminal Proceeds Act".

History. Acts 1993, No. 1148, § 1; deleted "and" following "known" and substituted "or" for "and/or."
2005, No. 1962, § 6.

Amendments. The 2005 amendment

5-42-202. General legislative findings, declarations, and intent.

(a)(1) The General Assembly finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.

(2) These criminal gangs, organizations, or enterprises support themselves by engaging in criminal activity for profit, most commonly through the distribution of controlled substances and by theft of property.

(b)(1) The General Assembly further finds that with increasing frequency, criminals are using sophisticated means of concealing criminal proceeds and in most cases moving criminal proceeds out of Arkansas.

(2)(A) In order to reap the rewards of their criminal conduct, criminals must conceal the source of the criminal proceeds and the identity of the individuals who work to obtain the criminal proceeds.

(B) They convert the criminal proceeds to property or assets that appear to have come from a legitimate source.

(C)(i) Often they must maintain the property or assets in another person's name.

(ii) This also helps them to avoid detection, identification, and seizure.

(3)(A) While individual criminals launder their criminal proceeds, this is particularly common among members and associates of criminal gangs, organizations, and enterprises.

(B) There is strong evidence that this increased sophistication is due largely to contact with other criminal gangs, organizations, or enterprises from other states.

(c) The General Assembly further finds that we cannot afford to allow millions of dollars in untaxed criminal proceeds to be taken from the state's economy each year.

(d) The intent of the General Assembly is to enact penalties that will:

(1) Deter and punish the criminal use of property or the laundering of criminal proceeds; and

(2) Facilitate the investigation of the criminal use of property or the laundering of criminal proceeds.

History. Acts 1993, No. 1148, § 2; 2005, No. 1962, § 7.

Amendments. The 2005 amendment deleted "of the State of Arkansas" following "The General Assembly" throughout this section; in (d), deleted "deter and

punish the criminal use of property and/or the laundering of criminal proceeds, and facilitate the investigation thereof" following "will"; inserted (d)(1) and (d)(2); and made related changes.

5-42-203. Definitions.

As used in this subchapter:

(1) "Conducts" means initiating or concluding, or participating in initiating or concluding, a transaction;

(2) "Contraband" means any funds or property or monetary instrument that is criminal proceeds or that was otherwise used with the knowledge and consent of the owner to facilitate a violation of this subchapter, as well as any related record and any other article possessed under circumstances prohibited by law;

(3) "Crime of pecuniary gain" means any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value;

(4) "Crime of violence" means any violation of Arkansas law in which a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape;

(5) "Criminal proceeds" means:

(A) Anything of value furnished or intended to be furnished in exchange for criminal conduct or contraband received in violation of state or federal law; and

(B) Property or profits traceable to an exchange described in this subdivision (5);

(6) "Monetary instrument" means any:

(A) Coin or currency of the United States or of any other country; and

(B) Traveler's check, personal check, bank check, money order, investment security in bearer form or otherwise in such form that title to the investment security passes upon delivery, and negotiable

instrument in bearer form or otherwise in such form that title to the negotiable instrument passes upon delivery;

(7) "Predicate criminal offense" means any violation of Arkansas law that is a crime of violence or crime of pecuniary gain; and

(8)(A) "Transaction" means any acquisition or disposition of property by any means, including a purchase, sale, trade, investment, payment, loan, pledge, gift, transfer, delivery, deposit, withdrawal, transfer between accounts, exchange of currency, extension of credit, purchase or sale of any stock bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

(B) Subdivision (8)(A) of this section is not an exclusive list.

History. Acts 1993, No. 1148, § 3.

5-42-204. Criminal use of property or laundering criminal proceeds.

(a) A person commits the offense of criminal use of property or laundering criminal proceeds if the person knowingly:

(1) Conducts or attempts to conduct a transaction involving criminal proceeds that were derived from any predicate criminal offense, or that were represented to be criminal proceeds from any predicate criminal offense, with the intent to:

(A) Conceal the location, source, ownership, or control of the criminal proceeds;

(B) Avoid a reporting requirement under state or federal law; or

(C) Acquire any interest in the criminal proceeds; or

(2) Uses or makes available for use any property in which he or she has any ownership or lawful possessory interest to facilitate a predicate criminal offense.

(b) Any person who is guilty of criminal use of property or laundering criminal proceeds commits a Class C felony.

(c)(1) Upon conviction, the prosecuting attorney may institute a civil action against any person who violates this section to obtain a judgment against any person who violates this section, jointly and severally, for damages in an amount equal to property, funds, or a monetary instrument involved in the violation as well as the proceeds acquired by any person involved in the enterprise or by reason of conduct in furtherance of the violation, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.

(2) The standard of proof in an action brought under this subsection is preponderance of the evidence.

(3) The procedures for forfeiture and distribution in the asset forfeiture law, § 5-64-505, apply.

(4) A defendant in a civil action brought under this subsection is entitled to trial by jury.

(d)(1) An attorney who represents a criminal defendant or person who he or she reasonably believes may become a criminal defendant

may not be prosecuted for receiving payment for a service rendered to a person whom he or she represents in a criminal proceeding or in dealing with a matter that might reasonably become the subject of a criminal proceeding.

(2) Should a court deny a motion to dismiss, a licensed attorney may maintain this as a defense at trial.

(3) No payment described in subdivision (d)(1) of this section may be seized from the attorney if the payment was received for a service rendered pursuant to prosecution under this section, unless a court of competent jurisdiction determines after a hearing that seizure of the property is necessary for prosecution of any criminal matter and is not protected by any applicable privilege.

History. Acts 1993, No. 1148, § 4; 2005, No. 1962, § 8.

Amendments. The 2005 amendment substituted “or” for “and/or” and inserted “or she” following “he” throughout this

section; substituted “subsection” for “section” in (c)(2); substituted “No” for “Furthermore, no” in (d)(3); and made minor stylistic and punctuation changes.

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Prospective sellers of real property could not defend their refusal to complete the sale on the ground that the prospective buyer pled guilty to federal charges of possession and conspiracy to distribute illegal drugs and, therefore, their suspi-

cion that the money the buyer would use to pay notes secured by a mortgage on the property might be derived by the buyer, in whole or in part, from an illegal source. *Jacks v. W. Secured Invs. Co.*, 73 Ark. App. 437, 43 S.W.3d 229 (2001).

5-42-205. Investigative powers.

(a) The prosecuting attorney may file an ex parte petition supported by affidavit or recorded sworn testimony before any judicial officer of competent jurisdiction seeking any record or report required to be made by law.

(b) The judicial officer may order the custodian to deliver to the prosecuting attorney any record or report that is required to be made by Arkansas law, including a tax record or report, if the court finds reasonable cause to believe that the record or report requested is needed for a legitimate investigative or prosecutorial purpose and that the investigation or prosecution involves a violation of any predicate criminal offense.

(c) The judicial officer may order the custodian to deliver to the prosecuting attorney any record or report that is required to be made by federal law if federal law does not specifically prohibit the record or report's disclosure to a state prosecuting attorney and if the court finds reasonable cause to believe that the record or report requested is needed for a legitimate investigative or prosecutorial purpose and that the investigation or prosecution involves a violation of this section or any predicate criminal offense.

(d)(1) Nothing in this section requires a court order when any record or report may currently be obtained pursuant to the prosecuting attorney's subpoena power.

(2) However, the prosecuting attorney may use the procedure and burden established in this section to obtain any other record or report, notwithstanding whether the law requires the record or report to be made or a court order for disclosure.

(e) Any record or report disclosed under a provision of this section may be introduced as evidence if the record or report is otherwise admissible under the applicable rule of evidence.

(f) An individual whose record is obtained shall be notified by the prosecuting attorney ninety (90) days after the order is issued unless a court finds the investigation is continuing and enters an order deferring the notice requirement under this subsection until ninety (90) days after the investigation is completed or until prosecution has been initiated and a motion for discovery granted.

History. Acts 1993, No. 1148, § 5.

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